# LEGALITAS LARANGAN PENGGUNAAN JILBAB BAGI PEREMPUAN MUSLIM YANG BEKERJA DI PERANCIS BERDASARKAN PERSPEKTIF HUKUM INTERNASIONAL
## (Studi Kasus Asma Bougnaoui vs Micropole)

**SKRIPSI**

**Diajukan Untuk Memenuhi Sebagian Syarat-Syarat Memperoleh Gelar Kesarjanaan Dalam Ilmu Hukum**


**Oleh :**
**EKA RAHMADINI**
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**UNIVERSITAS BRAWIJAYA**
**FAKULTAS HUKUM**
**MALANG**

**2018**

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**SURAT PERNYATAAN**

**KEASLIAN SKRIPSI**

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Menyatakan bahwa dalam penulisan karya ilmiah hukum berupa skripsi ini adalah asli karya penulis, tidak ada karya/data yang orang lain yang telah dipublikasikan, juga bukan karya orang lain dalam rangka mendapatkan gelar kesarjanaan di perguruan tinggi, kecuali kutipan – kutipan yang telah saya sebutkan sumbernya.

Demikian surat pernyataan ini saya buat, jika di kemudian hari terbukti karya ini merupakan karya orang lain baik yang dipublikasikan maupun dalam rangka memperoleh gelar kesarjanaan di perguruan tinggi, saya sanggup dicabut gelar kesarjanaan saya.

Malang, 31 Oktober 2018

Yang menyatakan,

Eka Rahmadini

NIM. 145010100111025

# KATA PENGANTAR

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Penulis yakin skripsi ini masih sangat jauh dari kata sempurna, sehingga masukan dan kritik akan selalu penulis harapkan untuk memperbaiki skripsi ini.

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Semoga Allah Subhanahu Wa Ta'ala mengampuni kesalahan kita dan berkenan menunjukkan jalan yang benar.

Malang, 1 Oktober 2018

Eka Rahmadini

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**LEGALITAS LARANGAN PENGGUNAAN JILBAB**
**BAGI PEREMPUAN MUSLIM YANG BEKERJA DI PERANCIS**
**BERDASARKAN PERSPEKTIF HUKUM INTERNASIONAL**
**(Studi Kasus Asma Bougnaoui vs Micropole)**

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## ABSTRAK

Beberapa negara di Eropa termasuk Perancis memiliki larangan untuk menggunakan jilbab di temapt kerja. Salah satu kasusnya terjadi di Perancis yang menimpa Asma Bougnaoui. Asma bekerja di salah satu perusahaan di Perancis yang bernama Micropole sebagai konsultan IT. Dikarenakan pada saat melakukan kunjungan ke kantor klien Micropole dan pada waktu kunjungan tersebut, Asma menggunakan jilbab. Maka perusahaan klien mengadu kepada Micropole bahwa jilbab yang dipakai pada saat kunjungan tersebut sangat mengganggu. Micropole kemudian menyuruh Asma untuk membuka jilbabnya jika bertemu dengan klien, karena Asma tidak menuruti perintah tersebut, akhirnya Micropole memecat Asma. Tidak terima dengan hal tersebut, Asma membawa kasus tersebut ke pengadilan. Skripsi ini akan menganalisa penggunaan jilbab bagi perempuan muslim di tempat bekerja di Perancis berdasarkan perspektif hukum internasional dan perlindungan hukum bagi pekerja perempuan yang bekerja di Perancis berdasarkan hukum nasional dan hukum internasional. Analisa skripsi ini menggunakan pendekatan kasus dan pendekatan undang – undang. Selain itu Skripsi ini juga menganalisa bagaimana aturan hukum Uni Eropa yang menjunjung tinggi hak asasi manusia dan melarang adanya diskriminasi.

**Legality over Prohibition on wearing Hijab for Muslim Women working in France seen from the Perspective of International Law**

**(A case study on Asma Bougnaoui vs Micropole)**

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## ABSTRACT

Several European countries including France have prohibited women from wearing hijab at workplace. One of the cases of this situation was experienced by Asma Bougnaoui in France. Asma works in a company in France called Micropole as an IT consultant. Once Asma visited one of Micropole's clients and surely she was wearing hijab during her visit. Later this was followed by a complaint coming from the client reporting to Micropole that the hijab was annoying to the client. This was responded by an order given by Micropole to Asma to take off her hijab only when she had an appointment with a client. The rejection to take off the hijab brought Asma to expulsion. Asma decided to act further by bringing this case to court. This thesis is aimed to analyse the use of hijab for Muslim women working in France based on the perspective of international law and legal protection for female workers working in France according to both national and international law. The thesis was analysed with case and statute approaches. The analysis was also extended to the contrast in which the European Union is well known for its high appreciation toward human rights and its position strongly against discrimination.

# BAB 1

# PENDAHULUAN

## A. LATAR BELAKANG

Hak dasar setiap manusia yakni hak untuk hidup. Hak tersebut tercantum dalam *article 3 Universal Delaration of Human Rights 1948* (yang selanjutnya disebut dengan UDHR 1948) yang menyatakan "*everyone has the rights to life, liberty, and security of person*".[1] Dalam proses untuk bertahan hidup, manusia membutuhkan biaya guna memenuhi kebutuhan hidupnya. Biaya tersebut akan didapat jika seseorang berkemauan untuk bekerja.

Menurut Kamus Besar Bahasa Indonesia (yang selanjutnya disebut KBBI), "bekerja adalah melakukan sesuatu pekerjaan (perbuatan); berbuat sesuatu".[2] Jika tiap – tiap orang yang mampu melaksanakan pekerjaan, baik di dalam maupun di luar hubungan kerja guna menghasilkan jasa atau barang untuk memenuhi kebutuhan masyarakat, mereka disebut dengan tenaga kerja.[3] Sedangkan, orang yang sudah bekerja disebut dengan pekerja hal ini dikarenakan orang tersebut telah menerima upah, gaji atau imbalan atas hasil kerjanya. Pejabat negara, pegawai negeri sipil atau militer, pengusaha, ataupun buruh termasuk dalam kategori pekerja.[4]

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1 *Article 3 Universal Declaration of Human Rights 1948*. Terjemahan: Setiap orang berhak atas kehidupan, kebebasan dan keselamatan sebagai individu

2 Kamus Besar Bahasa Indonesia (KBBI) *online*, ***Keyword: Kerja***, Sumber: https://kbbi.web.id/kerja, diakses pada 1 Desember 2017 pukul 11.15 WIB

3 Abdul Khakim, **Dasar – Dasar Hukum Ketenagakerjaan Indonesia**, Citra Aditya Bakti, Bandung, 2014, hlm. 2

4 Abdul Khakim, *Loc.cit*.,hlm. 2

Di era – emansipasi[5] perempuan sekarang ini, perempuan juga mempunyai hak untuk bekerja. Mereka tidak hanya ingin berdiam diri di rumah dan hanya melakukan pekerjaan sebagai ibu rumah tangga. Keinginan perempuan untuk bekerja dilatarbelakangi oleh persamaan hak yang tercantum dalam *article 23 number (1)* UDHR 1948 yang menyatakan,

> "*Everyone has the rights to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment*".[6]

Hal yang seringnya terjadi dalam dunia ketenagakerjaan[7] saat ini, yakni adanya perlakuan diskriminasi terkait agama yang dialami oleh perempuan. Seperti diketahui bahwa perbuatan diskriminasi merupakan sebuah bentuk pelanggaran atau penyimpangan dari pelaksanaan hak asasi manusia itu sendiri. Diskriminasi merupakan hal yang akan terus menerus terjadi dan juga dapat menjadi ancaman dalam dunia kerja dengan bentuk pelanggaran Hak Asasi Manusia (yang selanjutnya disebut dengan HAM).

Mengenai HAM, negara berkewajiban untuk menghormati (*to respect*), melindungi (*to protect*), dan memenuhi (*to fulfill*) hak – hak asasi

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5 Pembebasan dari perbudakan; persamaan hak dalam berbagai aspek kehidupan masyarakat (seperti persamaan hak kaum perempuan dengan kaum pria), dikutip dari Kamus Besar Bahasa Indonesia (KBBI) *online*, ***Keyword: Emansipasi***, Sumber: https://kbbi.web.id/emansipasi, diakses pada 1 Desember 2017 pukul 13.45 WIB

6 *Article 23 number (1) Universal Declaration of Human Rights 1948*. Terjemahan: Setiap orang berhak atas pekerjaan, berhak dengan bebas memilih pekerjaan, berhak atas syarat – syarat perburuhan yang adil dan menguntungkan serta berhak atas perlindungan dari pengangguran

7 Segala hal yang berhubungan dengan tenaga kerja pada waktu sebelum, selama, dan sesudah masa kerja, dikutip dari Pasal 1 angka 1 Undang – Undang Nomor 13 Tahun 2003 tentang Ketenagakerjaan

setiap warga negaranya.[8] Hal ini sesuai dengan yang tercantum dalam *preamble Universal Decaration of Human Rights 1948* yang menyatakan,

> "*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*".[9]

Kemudian lebih dipertegas dengan pernyataan,

> "*Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and appression, that human rights should be protected by the rule of law*".[10]

Sehingga dapat dikatakan bahwa dasar kemerdekaan, keadilan dan perdamaian di dunia yakni dengan adanya pengakuan atas Hak Asasi Manusia. Hal yang lebih mendasar yaitu perlu adanya sebuah sistem hukum dari masing – masing negara untuk memberikan jaminan perlindungan dan kepastian hukum guna melindungi harkat dan martabat manusia.

Salah satu diskriminasi yang dialami oleh pekerja perempuan yang dikaitkan denga isu agama, contohnya terjadi pada pekerja perempuan yang memakai atau menggunakan jilbab[11] pada saat bekerja di lingkungan tertentu. Padahal pekerja perempuan muslim tersebut hanya menjalankan

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8 Adon Nasrullah, **Agama dan Konflik Sosial Studi Kerukunan Umat Beragama, Radikalisme, dan Konflik Antarumat Beragama**, Pustaka Setia, Bandung, 2015, hlm. 193

9 Paragraf pertama *preamble Universal Declaration of Human Rights 1948*. Terjemahan: bahwa pengakuan atas martabat alamiah dan hak – hak yang sama dan tidak dapat dicabut dari semua anggota keluarga manusia adalah dasar kemerdekaan, keadilan dan perdamaian di dunia

10 Paragraf ketiga *preamble Universal Declaration of Human Rights 1948*. Terjemahan: bahwa hak – hak manusia perlu dilindungi dengan peraturan hukum, supaya orang tidak akan terpaksa memilih jalan pemberontakan sebagai usaha terakhir guna menentang tirani dan penindasan

11 Jilbab merupakan kerudung atau kain yang menutupi kepala wanita dan aurat wanita, Sumber: Badi'atul Husna, Skripsi: **Identitas Sosial Pengguna Jilbab Dalam Kelompok Mahasiswi, Inkafa, Kelompok Rohis Universitas Brawijaya dan Komunitas Hijaber Malang**, Malang: Universitas Islam Negeri Maulana Malik Ibrahim, 2015, hlm. 20

sebuah syariat[12] yang diperintahkan oleh agama islam, yang merupakan wujud dari kebebasan beragama.

Dalam beberapa tahun terakhir, banyak negara yang membatasi atau melarang perempuan untuk memakai pakaian yang berhubungan dengan agamanya, daripada mengharuskan perempuan untuk berpakaian dengan cara tertentu. Tata cara berpakaian dan penampilan perempuan bahkan diatur dalam undang – undang, kebijakan atau peraturan pemerintah.

Hukum atau kebijakan yang membatasi kemampuan perempuan untuk memakai pakaian religius sangat umum terjadi di Eropa, dimana 18 dari 45 negara di wilayah ini memiliki setidaknya satu undang – undang, kebijakan atau peraturan pemerintah yang membatasi.[13] Bahkan beberapa negara Eropa secara efektif melarang jenis pakaian keagamaan tertentu di tempat umum seperti di Perancis.

Kasus yang terjadi di Perancis menimpa Asma Bougnaoui. Bougnaoui kehilangan pekerjaannya sebagai seorang konsultan IT di perusahaan Micropole SA, yang terletak di Perancis pada bulan Juni 2009.[14] Bougnaoui telah bekerja untuk Micropole SA selama setahun. Bougnaoui dipecat setelah melakukan perjalanan ke sebuah pertemuan

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12 Syariat adalah seperangkat norma atau aturan yang berasal dari Tuhan (Allah) yang mengatur hubungan manusia dengan Tuhan (Allah), hubungan manusia dengan manusia lain dalam kehidupan sosial, hubungan manusia dengan benda dan alam lingkungan hidupnya, dikutip dari Mohammad Daud, **Hukum Islam; Pengantar Ilmu Hukum dan Tata Hukum Islam di Indonesia**, Raja Grafindo Persada, Jakarta, 2013, hlm. 34

13 *Pew Research Center*, ***Keyword: Restriction on Women's Religious Attire***, Sumber: http://www.pewforum.org/2016/04/05/restrictions-on-womens-religious-attire/,diakses pada 1 Desember 2017 Pukul 15.00 WIB

14 *The Guardian*, ***Senior EU Lawyer Backs French Woman Sacked for Wearing Hijab***, Sumber: https://www.theguardian.com/world/2016/jul/13/european-court-backs-french-women-sacked-hijab-asma-bougnaoui, diakses pada 1 Desember 2017 Pukul 17.00 WIB

dengan klien di sebuah perusahaan Perancis di Toulouse. Perusahaan tersebut mengeluh kepada Micropole bahwa jilbab yang dikenakan oleh Bougnaoui membuatnya merasa tidak nyaman. Lalu perusahaan tersebut melapor ke Micropole. Micropole kemudian meminta Bougnaoui untuk melepaskan jilbabnya pada saat kunjungan berikutnya. Karena Bougnaoui tidak mau melepaskan jilbabnya, akhirnya Micropole memecat Bougnaoui dengan alasan bahwa jilbab yang dikenakannya akan menghambat pengembangan perusahaan yang berarti perusahaan tidak bisa berinteraksi dengan klien – klien lainnya.

Bougnaoui tidak menerima pemecatan tersebut yang akhirnya mengajukan kasus tersebut ke *The Conseil de Prud'hommes de Paris* (Pengadilan Buruh, Paris, Perancis). Tidak terima dengan putusan tersebut, Bougnaoui mengajukan banding atas putusan tersebut ke *The Cour d'appel de Paris* (Pengadilan Banding, Paris, Perancis). Tidak puas dengan putusan dari Pengadilan Banding, Bougnaoui membawa kasus tersebut ke *Cour de cassation* (Pengadilan Kasasi). *Cour de cassation* kemudian menyimpulkan bahwa apa yang dilakukan oleh Micropole SA kepada Bougnaoui merupakan sebuah diskriminasi yang bertentangan dengan *Directive 2000/78/EC*[15].

Kasus Bougnaoui tersebut, bertentangan dengan beberapa konvensi internasional, diantaranya UDHR 1948, *European Convention on Human Rights* (yang selanjutnya disebut dengan ECHR), *Convention on the*

[15] *Directive 2000/78/EC* merupakan undang – undang hukum Uni Eropa tentang kesetaraan ketenagakerjaan yang mengharuskan semua negara anggota Uni Eropa untuk melarang pengusaha melakukan diskriminasi atas dasar agama atau keyakinan, cacat, usia atau orientasi seksual

*Elimination of all Forms of Discrimination Against Women* (yang selanjutnya disebut dengan CEDAW) 1979, dan *International Covenant on Civil and Political Rights* (yang selanjutnya disebut dengan ICCPR).

Perancis menandatangani UDHR 1948, sejak UDHR tersebut diadopsi oleh Majelis Umum PBB pada tanggal 10 Desember 1948 di Palais de Chaillot, Paris.[16] Sedangkan ECHR, Perancis meratifikasi pada tanggal 3 Mei 1974.[17] Konvensi CEDAW 1979 tersebut ditandatangani pada tanggal 17 Juli 1980, yang kemudian diratifikasi oleh Perancis pada tanggal 14 Desember 1983.[18] Dengan adanya ratifikasi tersebut secara langsung Perancis setuju untuk diikat dalam konvensi tersebut. Hal ini dikarenakan adanya prinsip dalam hukum internasional yang menyatakan, bahwa setiap perjanjian yang berlaku akan mengikat terhadap para pihak – pihak pada perjanjian dan harus dilaksanakan dengan itikad baik.[19] Selain itu Perancis juga melanggar ICCPR karena mengingat Perancis sudah meratifikasi instrument hukum internasional tersebut. Padahal dalam ICCPR terdapat hak kebebasan beragama yang dinyatakan secara terperinci.

Oleh karena itu, penulis tertarik untuk meneliti tentang bagaimana legalitas larangan penggunaan jilbab bagi pekerja perempuan muslim yang bekerja di Perancis berdasarkan perspektif hukum internasional dan perlindungan hukum bagi pekerja perempuan muslim yang mengalami

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16 https://unethiopia.org/universal-declaration-of-human-rights-signatories/, diakes pada 2 Desember 2017 Pukul 06.15 WIB

17 https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures, diakses pada 2 Desember 2017 Pukul 06.20 WIB

18 *University of Minnesota: Human Rights Library*, ***Keyword: France and Belgia***, Sumber: http://hrlibrary.umn.edu/index.html, diakses pada 2 Desember 2017 Pukul 07.00

19 Kholis Roisah, **Hukum Perjanjian Internasional Teori dan Praktik**, Setara Press, Malang, 2015, hlm. 16

diskriminasi terkait larangan penggunaan jilbab pada saat bekerja di Perancis berdasarkan perspektif hukum nasional dan hukum internasional dengan berdasarkan studi kasus Asma Bougnaoui vs Micropole.

**Tabel 1.1**

**Tabel Originalitas**

| **Nama** | **Tahun Penelitian** | **Judul Penelitian** | **Rumusan Masalah** | **Persamaan dan Perbedaan** |
|---|---|---|---|---|
| Nadya Arviani, Universitas Indonesia | 2010 | Peran Pemerintah Perancis Dalam Penyelesaian Kontroversi Penggunaan Atribut Keagamaan di Sekolah Negeri di Perancis Melalui UU No. 2004 – 228 15 Maret | Faktor apakah yang melatarbelakangi pemberlakuan UU No. 2004 – 228 15 Maret 2004 mengenai pelarangan penggunaan atribut keagamaan di sekolah negeri Perancis? | Persamaan penelitian saya dengan ketiga penelitian di samping terletak pada studi negaranya yang menggunakan Perancis, sedangkan Perbedaannya terletak |

| | | | | |
|---|---|---|---|---|
| | | 2004 | | pada objek penelitian, yang mana saya menekankan penelitian pada diskriminasi yang dialami oleh pekerja wanita muslim yang bekerja di Perancis |
| Sauri Susanto, Universitas Islam Negeri Syarif Hidayatullah | 2014 | Dukungan *European Court of Human Rights* Bagi Pelarangan Jilbab, di Sekolah Serta Niqab dan Burqa di Perancis | Mengapa *European Court of Human Rights* mendukung pelarangan jilbab di sekolah dan niqab serta burqa di Perancis pada tahun 2004 – 2013? | |
| Oki Rianda Putra, Universitas Muhammadiyah Yogyakarta | 2014 | Kebijakan Larangan Pemakaian Berjilbab di Perancis Tahun 2004 | Faktor apa yang menyebabkan munvulnya larangan pemakaian jilbab di Perancis tahun 2004 pada masa | |

| | | | | |
|---|---|---|---|---|
| | | | pemerintahan Jacquez Chirac? | |

## B. RUMUSAN MASALAH

1. Bagaimanakah legalitas larangan penggunaan jilbab bagi perempuan muslim yang bekerja di Perancis berdasarkan perspektif hukum internasional?
2. Bagaimanakah perlindungan hukum bagi pekerja perempuan muslim yang mengalami diskriminasi terkait larangan penggunaan jilbab pada saat bekerja di Perancis berdasarkan perspektif hukum nasional dan hukum internasional?

## C. TUJUAN PENELITIAN

Berdasarkan latar belakang dan rumusan masalah yang sudah diuraikan di atas, adapun tujuan yang ingin dicapai dalam penelitian ini yaitu,

1. Mendeskripsikan bagaimana legalitas terhadap larangan penggunaan jilbab bagi pekerja perempuan muslim yang bekerja di Perancis berdasarkan perspektif hukum internasional.
2. Mendeskripsikan bagaimana perlindungan hukum bagi pekerja perempuan muslim yang mengalami diskriminasi terkait larangan penggunaan jilbab pada saat bekerja di Perancis berdasarkan perspektif hukum nasional dan hukum internasional

## D. MANFAAT PENELITIAN

Manfaat dari penelitian ini adalah,

1. Manfaat Teoritis

    a. Dengan adanya penelitian ini, penulis berharap dapat memberikan manfaat bagi perkembangan ilmu pengetahuan hukum khususnya di bidang hukum internasional yang berkaitan dengan legalitas larangan penggunaan jilbab bagi pekerja perempuan muslim yang bekerja di Perancis berdasarkan perspektif hukum internasional dan perlindungan hukum bagi pekerja perempuan muslim yang mengalami diskriminasi terkait larangan penggunaan jilbab pada saat bekerja di Perancis berdasarkan perspektif hukum nasional dan hukum internasional.

    b. Dengan adanya penelitian ini, penulis berharap tulisan ini dapat menjadi sebuah referensi atau rujukan bagi mahasiswa, dosen dan masyarakat dalam menambah wawasan dan pengetahuan di bidang hukum internasional yang berkaitan dengan legalitas larangan penggunaan jilbab bagi pekerja perempuan muslim yang bekerja di Perancis berdasarkan perspektif hukum internasional dan perlindungan hukum bagi pekerja perempuan muslim yang mengalami diskriminasi terkait larangan penggunaan jilbab pada saat bekerja di Perancis berdasarkan perspektif hukum nasional dan hukum internasional.

2. Manfaat Praktis

a. Bagi Pembuat Kebijakan

Penelitian ini diharapkan dapat memberikan sumbangan pemikiran secara teoritis dalam mengembangkan pengetahuan hukum khususnya mengenai legalitas larangan penggunaan jilbab bagi pekerja perempuan muslim di yang bekerja di Perancis berdasarkan perspektif hukum internasional dan perlindungan hukum bagi pekerja perempuan muslim yang mengalami diskriminasi terkait larangan penggunaan jilbab pada saat bekerja di Perancis berdasarkan perspektif hukum nasional dan hukum internasional.

b. Bagi Mahasiswa

Penelitian ini diharapkan dapat menjadi bahan acuan dan/atau bahan informasi untuk penelitian lain dalam mengembangkan dan menelaah secara mendalam terkait hukum internasional khususnya mengenai legalitas larangan penggunaan jilbab bagi pekerja perempuan muslim di yang bekerja di Perancis berdasarkan perspektif hukum internasional dan perlindungan hukum bagi pekerja perempuan muslim yang mengalami diskriminasi terkait larangan penggunaan jilbab pada saat bekerja di Perancis berdasarkan perspektif hukum nasional dan hukum internasional.

## E. SISTEMATIKA PENULISAN

Sistematika penulisan dalam tugas akhir ini, disusun sebagai berikut:

BAB 1 PENDAHULUAN

Bab ini menjelaskan tentang latar belakang, rumusan masalah, tujuan penelitian, manfaat penelitian, dan pembatasan masalah

BAB II KAJIAN PUSTAKA

Bab ini menjelaskan tentang kajian umum tentang legalitas, kajian umum tentang diskriminasi, kajian umum tentang hukum internasional, kajian umum tentang hak kebebasan beragama

BAB III METODOLOGI PENELITIAN

Bab ini menjelaskan tentang jenis penelitian hukum, pendekatan penelitian hukum, sumber bahan hukum, teknik pengumpulan bahan hukum, teknik analisa bahan hukum, sistematika penulisan dan definisi konseptual

BAB IV PEMBAHASAN

Bab ini menjelaskan tentang analisis dari permasalahan yang sudah dirumuskan di dalam rumusan masalah

BAB V KESIMPULAN DAN SARAN

Bab ini menjelaskan tentang beberapa kesimpulan dari hasil penelitian serta saran yang ingin disampaikan oleh penulis

# BAB II

# KAJIAN PUSTAKA

## A. Kajian Umum tentang Legalitas

Asas legalitas merupakan unsur utama dari sebuah negara hukum.[1] Dimana semua tindakan negara harus bedasarkan dan bersumber pada Undang – Undang, serta tidak boleh keluar dari batas – batas yang sudah ditetapkan dalam Undang – Undang.[2] Secara terminologi, asas legalitas pada dasarnya sering disebut "*principle of legality*", "*legaliteitbeginsel*", "*non - retroactive*", atau "*de la legalite*".[3] Asas legalitas pertama kali disebut dalam *article* 8 *Déclaration des Droits de l'homme et du citoyen* 1789, yang menyatakan,

> "*La loi ne doit établir que des peines strictement et évidemment nécessaires, et nul ne peut être puni qu'en vertu d'une Loi établie et promulguée antérieurement au délit, et légalement appliquée*".[4]

Penerapan asas legalitas memiliki variasi beragam antara satu negara dengan negara lainnya, tergantung dari sistem pemerintahan yang berlaku di negara yang bersangkutan. Sistem Eropa Kontinental cenderung menerapkan atau memberlakukan asas legalitas yang lebih kaku daripada penerapannya di negara – negara yang menganut sistem *Common Law*.[5] Di negara – negara penganut sistem Eropa Kontinental, asas legalitas menjadi

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1 Putera Astomo, **Hukum Tata Negara Teori dan Praktek**, Tahafa Media, Yogyakarta, 2014, hlm. 42

2 Putra Astomo, *Loc.cit*, hlm. 42

3 Ramadan Tabiu dan Eddy O.S. Hiariej, **Tesis: Pertentangan Asas Legalitas Formil Dengan Asas Legalitas Materiel Dalam Rancangan Undang – Undang Kitab Undang – Undang Hukum Pidana (ruu Kuhp)**, Yogyakarta, 2012, hlm. 4

4 *Article 8 Declaration des droits de L'homme et du citoyen*. Terjemahan: Undang – Undang hanya harus menetapkan hukuman secara ketat dan jelas, dan tidak ada yang bisa dihukum di bawah hukum yang belum ditetapkan dan disebarluaskan sebelumnya

5 Sri Rahayu, 2014, **Implikasi Asas Legalitas Terhadap Penegakan Hukum dan Keadilan**, Jurnal Inovatif, Vol. VII No. III, September 2014, hlm. 2

alat untuk membatasi kekuasaan negara.[6] Sedangkan di negara – negara penganut sistem *Common Law,* asas legalitas tidak begitu menonjol karena prinnsip – prinsip *rule of law* telah tercapai dengan berkembangnya konsep *due process of law* yang didukung oleh hukum acara yang baik.[7]

## B. Kajian Umum tentang Diskriminasi

Diskriminasi bermula dari munculnya sebuah prasangka dalam diri setiap individu. Prasangka tersebut ada yang bersifat positif dan ada juga yang bersifat negatif. Prasangka ini seringkali didasari oleh ketidakpahaman dan ketidakpedulian pada kelompok "mereka", atau ketakutan atas sebuah perbedaan.[8] Prasangka tersebut muncul dikarenakan adanya *stigma* atau *stereotype* atau cap buruk yang sudah terpelihara dalam waktu lama bahkan dibudayakan oleh masyarakat.[9] Konsep inilah yang dianggap sebagai cikal bakal terjadinya sebuah perilaku diskriminasi.

Berikut adalah beberapa penjelasan mengenai diskriminasi. Menurut Theodorson & Theodorson, "diskriminasi adalah perlakuan yang tidak seimbang terhadap perorangan, atau kelompok, berdasarkan sesuatu, biasanya bersifat kategorikal, atau atribut – atribut khas, seperti berdasarkan ras, kesukubangsaan, agama, atau keanggotaan kelas – kelas sosial".[10] Sedangkan, menurut *article 1* CEDAW 1979 menyatakan,

> "*For the purposes of the present Convention, the term discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the*

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6 Sri Rahayu, *Loc.cit*., hlm. 2
7 Sri Rahayu, *Loc.cit*., hlm. 2
8 Fulthoni, et al., **Memahami Diskriminasi Buku Saku Untuk Kebebasan Beragama**, *The Indonesian Legal Resource Center* (ILRC), Jakarta, 2009, hlm. 5
9 Joko Kuncoro, 2007, **Prasangka dan Diskriminasi**, Jurnal Psikologi Proyeksi, Vol. 2 No.2, Oktober 2007, hlm. 4
10 Fulthoni, et.al.,*Op.cit*., hlm. 3

> *effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field*".[11]

Diskriminasi terbagi dalam beberapa kategori seperti menurut cara terjadinya dan menurut jenisnya. Diskriminasi menurut cara terjadinya dibagi menjadi dua yaitu diskriminasi yang dilakukan secara langsung dan diskriminasi yang dilakukan secara tidak langsung.[12] Diskriminasi langsung terjadi ketika seseorang baik secara langsung maupun tidak langsung diperlakukan dengan berbeda (*less favourable*) daripada lainnya.[13] Sedangkan, diskriminasi tidak langsung muncul ketika dampak dari hukum atau dalam praktek hukum merupakan bentuk diskriminasi, walaupun hal itu tidak ditujukan untuk tujuan diskriminasi.[14]

Diskriminasi berdasarkan jenisnya terbagi menjadi *pertama*, diskriminasi berdasarkan suku atau etnis, ras dan agama atau keyakinan; *kedua*, diskriminasi berdasarkan jenis kelamin dan *gender* (peran sosial karena jenis kelamin); *ketiga*, diskriminasi terhadap penyandang cacat; *keempat*, diskriminasi terhadap penderita sebuah penyakit menular dan berbahaya; *kelima*, diskriminasi karena adanya kasta sosial.[15]

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11 Terjemahan: Untuk tujuan Konvensi ini, istilah diskriminasi terhadap perempuan berarti setiap perbedaan, pengecualian atau pembatasan yang dibuat atas dasar jenis kelamin, yang memiliki efek atau tujuan untuk merusak atau menghapuskan pengakuan, penikmatan atau penggunaan hak – hak oleh perempuan terlepas dari perkawinan mereka, status atas dasar kesetaraan laki – laki dan perempuan, hak asasi manusia dan kebebasan fundamental di bidang politik, ekonomi, budaya sipil atau lainnya.

12 Rhona K.M., et.al.,**Hukum Hak Asasi Manusia**, PUSHAM UII, Yogyakarta, 2008, hlm. 40

13 Rhona K.M., et.al.,*Loc.cit.*,hlm. 40

14 Rhona K.M., et.al.,*Loc.cit.*,hlm. 40

15 Fulthoni, et.al.,*Op.cit*.,hlm. 4

## C. Kajian Umum tentang Hukum Internasional

Berdasarkan tempat berlakunya hukum dibedakan menjadi dua yaitu hukum nasional[16] dan hukum internasional. "Hukum Internasional adalah sekumpulan peraturan hukum yang sebagian besar mengatur tentang prinsip – prinsip dan aturan – aturan yang harus dipatuhi oleh negara – negara (subjek hukum internasional), dan hubungannya satu sama lain".[17]

Menurut Mochtar Kusumaatmadja dalam bukunya *Pengantar Hukum Internasional*, menyatakan "hukum internasional (publik) adalah keseluruhan kaidah – kaidah dan asas – asas hukum yang mengatur hubungan atau persoalan yang melintasi batas negara – negara (hubungan internasional) yang bukan bersifat perdata".[18]

Dalam praktek hubungan antar negara, masyarakat internasional memerlukan sebuah perjanjian internasional guna mengatur berbagai macam kegiatan dalam hubungan antar negara, menggariskan dasar - dasar kerjasama serta menyelesaikan berbagai masalah demi kelangsungan hidup bersama.[19] Suatu kesepakatan baru bisa disebut sebagai perjanjian internasional bilamana mengandung beberapa unsur yaitu, adanya para pihak yang terlibat dalam perjanjian, kesepakatan yang dilakukan oleh para pihak diatur oleh hukum internasional, serta kesepakatan tersebut

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16 Hukum Nasional adalah sekumpulan hukum yang sebagian besar terdiri dari prinsip – prinsip dan peraturan yang harus ditaati oleh warganya dalam suatu negara, dikutip dari Wagiman dan Anasthasya Saartje Mandagi, **Terminologi Hukum Internasional**, Sinar Grafika, Jakarta, 2016, hlm. 171

17 Wagiman dan Anasthasya Saartje Mandagi, **Terminologi Hukum Internasional**, Sinar Grafika, Jakarta, 2016, hlm. 178

18 Sefriani, **Hukum Internasional Suatu Pengantar**, Rajawali Pers, Jakarta, 2017, hlm. 2

19 Kholis Roisah, **Hukum Perjanjian Internasional Teori dan Praktek**, Setara Press, Malang, 2015, hlm. 1

dimaksudkan untuk menimbulkan akibat hukum bagi para pihak yang mengadakan perjanjian.[20] Subjek hukum perjanjian internasional adalah pihak – pihak yang mempunyai kemampuan untuk mengadakan perjanjian internasional seperti Negara, Organisasi Internasional, Takhta Suci, *International Committee of The Red Cross* (ICRC), *Belligerent* dan Individu secara terbatas.[21]

Dalam perjanjian – perjanjian internasional terdapat beberapa istilah yaitu *Treaty*, *Convention*,dan *Declaration*. *Treaty* atau Traktat merupakan perjanjian internasional yang mana materinya merupakan hal – hal yang menyangkut dengan persahabatan, perdamaian dan keamanan dunia.[22] *Convention* pada praktek biasanya digunakan untuk perjanjian – perjanjian yang para pihaknya mencakup sebagian besar negara – negara di dunia atau bisa disebut dengan perjanjian multilateral.[23] Sedangkan *Declaration* merupakan perjanjian yang berisikan prinsip – prinsip umum hukum dan pada umumnya digunakan untuk kesepakatan ataupun pernyataan sikap para pihak yang dihasilkan dalam sebuah konferensi internasional.[24]

Perjanjian internasional memeiliki beberapa prinsip hukum umum seperti, Prinsip *Pacta Sunt Servanda* yang berarti setiap perjanjian berlaku mengikat terhadap pihak – pihak pada perjanjian, Prinsip *Good Faith* yang

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20 Kholis Roisah, *Ibid*., hlm. 3
21 Kholis Roisah, *Ibid*., hlm. 5
22 Kholis Roisah, *Ibid*., hlm. 6
23 Kholis Roisah, *Loc.cit*., hlm. 6
24 Kholis Roisah, *Ibid*., hlm. 9

berarti setiap perjanjian harus dilaksanakan dengan itikad baik oleh para pihak, serta Prinsip persamaan hak (*equality rights*).[25]

Menurut hukum internasional, persetujuan negara untuk terikat secara hukum pada suatu perjanjian internasional dapat dinyatakan dengan cara penandatanganan (*signature*), ratifikasi (*ratification*) dan aksesi (*accession*). Penandatanganan atau *signature* merupkan persetujuan negara untuk diikat dalam suatu perjanjian dalam bentuk tanda tangan wakil negara tersebut dan apabila perjanjian itu sendiri yang menyatakannya, serta apabila terbukti bahwa negara – negara yang ikut berunding juga menyetujuinya.[26] Pengesahan atau *ratification* merupakan suatu tindakan negara yang dipertegas dengan pemberian persetujuan untuk diikat dalam perjanjian, sehingga perjanjian tersebut harus dikuatkan dengan pengesahan oleh badan yang berwenang di negara masing – masing peserta perjanjian tersebut.[27] Aksesi atau *accession* merupakan salah satu cara menyatakan persetujuan negara untuk terikat dalam perjanjian terutama bagi negara yang tidak ikut serta dalam proses pembuatan perjanjian.[28]

Dalam hukum internasional terdapat hubungan hukum antara hukum internasional (yang selanjutnya disebut HI) dan hukum nasional (yang selanjutnya disebut HN). Ada dua aliran besar yang memberikan argumentasinya. Aliran yang pertama dikenal dengan aliran monisme. Menurut aliran ini, antara HI dan HN terletak dalam satu sistem hukum,

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25 Kholis Roisah, *Ibid*., hlm. 16
26 Kholis Roisah, *Ibid*., hlm. 35
27 Kholis Roisah, *Ibid*., hlm. 36
28 Kholis Roisah, *Ibid*., hlm. 39

dimana HI berlaku di lingkungan HN, setaraf dengan HN dengan tetap mempertahankan sifat HI tanpa mengubahnya sepanjang isinya cocok untuk diterapkan pada hubungan – hubungan HN.[29] Dalam aliran ini, HI dapat diberlakukan langsung ke dalam HN tanpa perlu diubah terlebih dahulu ke dalam sistem HN.[30] Karena terletak dalam satu sistem hukum yang sama, besar kemungkinan terjadi sebuah konflik.

Dalam perkembangannya, aliran monisme terpecah menjadi dua yaitu aliran monisme primat HI dan aliran monisme primat HN.[31] Menurut aliran monisme primat HN, HI berasal dari HN, sehingga HN kedudukannya lebih tinggi dari HI, apabila terjadi konflik maka HN yang lebih diutamakan.[32] Sedangkan, aliran monisme primat HI menyatakan bahwa HN bersumber dari HI, sehingga kedudukan HI lebih tinggi dari HN, apabila terjadi konflik, HI harus diutamakan terlebih dahulu daripada HN.[33]

Selain aliran monisme, dikenal juga aliran dualisme. Aliran ini mengatakan bahwa antara HI dan HN merupakan dua sistem hukum yang sangat berbeda antara satu dengan lainnya.[34] Perbedaan tersebut terletak pada[35]:

1. Subjek, subjek hukum internasional adalah negara, sedangkan subjek hukum nasional adalah individu

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29 Sefriani, **Hukum Internasional Suatu Pengantar**, Rajawali Pers, Jakarta, 2017, hlm. 76
30 Sefriani, *Loc.cit*., hlm. 76
31 Sefriani, *Loc.cit*., hlm. 76
32 Sefriani, *Loc.cit*., hlm. 76
33 Sefriani, *Loc.cit*., hlm. 76
34 Sefriani, *Ibid*., hlm. 77
35 Sefriani, *Loc.cit*., hlm. 77

2. Sumber hukum, hukum internasional bersumber pada kehendek negara secara bersama – sama, sedangkan hukum nasional bersumber pada kehendak negara itu sendiri
3. Hukum nasional memiliki integritas yang lebih sempurna dibandingkan dengan hukum internasional

Secara fundamental, hukum internasional dan hukum nasional memiliki dua prinsip yang berbeda. Hukum internasional berprinsip bahwa perjanjian antar negara harus dihormati berdasarkan prinsip *pacta sunt servanda*, sedangkan hukum nasional berprinsip bahwa aturan negara (*state legislation*) harus dipatuhi.[36] Dalam aliran ini, hukum internasional dapat diberlakukan setelah ditransformasikan dalam hukum nasional, begitupun sebaliknya.[37]

## D. Kajian Umum tentang Hak Kebebasan Beragama

Menurut Achmad Ali dalam bukunya *Menguak Tabir Hukum*,

> "Hak merupakan suatu hubungan di antara orang – orang yang diatur oleh hukum dan atas nama si pemegang hak, oleh hukum diberi kekuasaan tertentu terhadap objek hak".[38]

Menurut Fitzgerald, terdapat ciri – ciri yang melekat pada hak yaitu,

> "Hak dilekatkan pada seseorang yang disebut sebagai pemilik atau subjek dari hak tersebut, hak itu tertuju pada orang lain yang memegang kewajiban di mana antara hak dan kewajiban terdapat hubungan korelatif, hak yang ada pada seseorang mewajibkan pihak lain untuk melakukan atau tidak melakukan suatu perbuatan, perbuatan menyangkut sesuatu yang disebut sebagai objek dari hak dan setiap hak menurut hukum mempunyai *title* yaitu suatu peristiwa tertentu yang merupakan alasan melekatnya hak itu pada pemiliknya".[39]

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36 Sefriani, *Loc.cit*., hlm. 77
37 Sefriani, *Loc.cit*., hlm. 77
38 Achmad Ali, **Menguak Tabir Hukum**, Ghalia Indonesia, Bogor, 2008, hlm. 179
39 Achmad Ali, *Loc.cit*., hlm. 179

Ada berbagai macam jenis hak, salah satunya adalah hak mutlak dan hak relatif. Hak mutlak merupakan hak yang memberikan kekuasaan kepada seseorang untuk melakukan perbuatan, hak yang mana harus dipertahankan terhadap siapapun juga serta semua orang harus menghormati hak tersebut.[40] Hak mutlak terbagi menjadi tiga yaitu hak asasi, hak publik mutlak dan hak di bidang keperdataan. Sedangkan hak relatif merupakan hak yang memberikan kekuasaan kepada orang tertentu untuk menuntut seseorang agar memberikan sesuatu, melakukan sesuatu atau tidak melakukan sesuatu.[41]

Hak kebebasan beragama termasuk dalam jenis hak mutlak yang bersifat *non – derogable rights* yang mana hak asasi manusia tidak dapat dikurangi dalam keadaan apapun.[42] Terkait isu kebebasan beragama, selain tercantum dalam UDHR 1948, juga tercantum dalam dokumen bersejarah tentang HAM seperti, *International Bill of Rights* (1966), *Rights of Man France* (1789) dan *Bill of Rights* (1966). Dalam *article 2* UDHR 1948 menyatakan,

> "*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non – self - governing or under any other limitation of sovereignty*".[43]

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40 Achmad Ali, *Ibid.*, hlm. 181

41 Achmad Ali, *Loc.*cit., hlm. 181

42 Budiyono, **Kebebasan Beragama Dalam Dokumen Hak Asasi Manusia Internasional**, PKKPUU & Bagian Hukum Internasional Fakultas Hukum Universitas Lampung, 2014, hlm. 61

43 *Article 2 Universal Declaration of Human Rights 1948*. Terjemahan: Setiap orang berhak

Secara umum UDHR 1948 mengandung empat hal pokok seperti hak individual atau bisa juga dipahami sebagai hak – hak yang hanya dimiliki oleh manusia atau orang, hak kolektif atau hak masyarakat yang hanya dapat dinikmati bersama orang lain, hak sipil dan politik serta hak ekonomi, sosial dan budaya.[44] Sedangkan di dalam *article 18 The International Bill of Human Rights* menyatakan,

> "*Everyone has the right to freedom of thought, conscience and religion, this right includes freedom to change his religion or belief, and freedom, either alone or in community will others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance*".[45]

*Article 18 The International Bill of Human Rights* membahas beberapa hal yaitu, menjamin hak atas kemerdekaan pemikiran, keyakinan dan agama, membahas perubahan dan peyebaran agama, dan manifestasi kebebasan beragama.[46] Hak kebebasan beragama secara lebih rinci diatur dalam *article 18, article 20 number 2* dan *article 27* ICCPR. *Article 18* ICCPR menyatakan,

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atas semua hak dan kebebasan – kebebasan yang tercantum di dalam Deklarasi ini dengan tidak ada pengecualian apapun, seperti pembedaan ras, warna kulit, jenis kelamin, bahasa, agama, politik atau pandangan lain, asal – usul kebangsaan atau kemasyarakatan, hak milik, kelahiran ataupun kedudukan lain. Selanjutnya tidak akan diadakan pembedaan atas dasar kedudukan politik, hukum atau kedudukan internasional dari negara atau daerah dari mana seseorang berasal, baik dari negara yang merdeka, yang berbentuk wilayah – wilayah perwalian, jajahan atau yang berada di bawah batasan kedaulatan yang lain

44 Budiyono, **Kebebasan Beragama Dalam Dokumen Hak Asasi Manusia Internasional**, PKKPUU & Bagian Hukum Internasional Fakultas Hukum Universitas Lampung, 2014, hlm. 61

45 *Article 18 The International Bill of Human* Rights. Terjemahan: Setiap orang berhak atas kebebasan berpikir, hati nurani dan agama; hak ini termasuk kebebasan untuk mengubah agama atau keyakinannya, dan kebebasan baik sendiri atau dalam komunitas orang lain dan di depan umum atau pribadi, untuk mewujudkan agama atau keyakinannya dalam mengajar, berlatih, beribadah dan melaksanakan agama

46 Budiyono, **Kebebasan Beragama Dalam Dokumen Hak Asasi Manusia Internasional**, PKKPUU & Bagian Hukum Internasional Fakultas Hukum Universitas Lampung, 2014, hlm. 62

1. "*Everyone shall have the right to freedom of thought, conscience and religion, This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching*".[47]
2. *"No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice"*.[48]
3. *"Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others"*.[49]
4. *"The States Parties to the present Convenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions"*.[50]

*Article 20 number 2* menyatakan,

> "*Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law*".[51]

*Artcile 27* menyatakan,

> "*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy*

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47 *Article 18 number 1 International Covenant on Civil and Political Rights*. Terjemahan: Setiap orang berhak atas kebebasan berpikir, keyakinan dan beragama. Hak ini mencakup kebebasan untuk menetapkan agama atau kepercayaan atas piihannya sendiri, dan kebebasan, baik secara sendiri maupun bersama-sama dengan orang lain, baik di tempat umum atau tertutup, untuk menjalankn agama dan kepercayaannya dalam kegiatan ibadah, pentataan, pengalaman, dan pengajaran.

48 *Article 18 number 2 International Covenant on Civil and Political* Rights. Terjemahan: Tidak seorang pun dapat dipaksa sehingga terganggu kebebasannya untuk menganut atau menetapkan agama atau kepercayaannya sesuai dengan pilihannya.

49 *Article 18 number 3 International Covenant on Civil and Political* Rights. Terjemahan: Kebebasan menjalankan dan menentukan agama atau kepercayaan seseorang hanya dapat dibatasi oleh ketentuan berdasarkan hukum, dan yang diperlukan untuk melindungi keamanan, ketertiban, kesehatan, atau moral masyarakat, atau hak-hak dan kebebasan mendasar orang lain.

50 *Article 18 number 4 International Covenant on Civil and Political* Rights. Terjemahan: Negara Pihak dalam Konvenan ini berjanji untuk menghormati kebebasan orang tua dan apabila diakui, wali hukum yang sah, untuk memastikan bahwa pendidikan agama dan moral bagi anak-anak mereka sesuai dengan keyakinan mereka sendiri.

51 *Article 20 number 2 International Covenant on Civil and Political* Rights. Terjemahan: Segala tindakan yang menganjurkan kebencian atas dasar kebangsaan, ras atau agama yang merupakan hasutan untuk melakukan diskriminasi, permusuhan atau kekerasan harus dilarang oleh hukum.

*their own culture, to profess and practise their own religion, or to use their own language* ".[52]

Sedangkan, *European Convention on Human Rights* (yang selanjutnya disebut dengan ECHR), merumuskan kebebasan beragama dalam *article 9 number 1 and 2*.[53] Rumusan kebebasan beragama yang tercantum dalam *article 9 ECHR* juga sekaligus mengatur pembatasan dalam pelaksanaan kebebasan beragama.[54] Rumusannya sebagai berikut:

1. Setiap orang berhak atas kebebasan berpikir, keyakinan, dan agama; hak ini mencakup juga kebebasan berganti agama atau kepercayaan, dan kebebasan untuk sendirian maupun bersama dengan orang lain dan baik secara terbuka maupun diam – diam, mewujudkan agama atau kepercayaannya dalam beribadah, mengajar, pengalaman, dan pentaatan.[55]
2. Kebebasan seseorang untuk mewujudkan agama atau kepercayaan hanya boleh dikenakan pembatasan yang diatur dengan undang – undang dan perlu dalam suatu masyarakat yang demokratis demi kepentingan keselamatan umum, untuk menjaga ketertiban,

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52 *Article 27 International Covenant on Civil and Political Rights*. Terjemahan: Di negara-negara yang memiliki kelompok minoritas berdasarkan suku bangsa, agama atau bahasa, orang-orang yang tergolong dalam kelompok minoritas tersebut tidak boleh diingkari haknya dalam masyarakat, bersama-sama anggota kelompoknya yang lain, untuk menikmati budaya mereka sendiri, untuk menjalankan dan mengamalkan agamanya sendiri, atau menggunakan bahasa mereka sendiri.

53 Budiyono, **Kebebasan Beragama Dalam Dokumen Hak Asasi Manusia Internasional**, PKKPUU & Bagian Hukum Internasional Fakultas Hukum Universitas Lampung, 2014, hlm. 67

54 Budiyono, *Loc.cit*. hlm. 67

55 Budiyono, *Loc.cit*. hlm. 67

kesehatan atau kesusilaan umum, atau untuk menjaga segala hak dan kebebasan orang – orang lain[56]





[56] Budiyono, *Ibid*. hlm. 68

# BAB III

# METODE PENELITIAN

## A. Jenis Penelitian Hukum

Penelitian hukum merupakan sebuah proses yang bertujuan untuk menemukan hukum yang megatur kegiatan dalam kehidupan bermasyarakat. Penelitian hukum dalam bahasan Inggris disebut *legal research* atau dalam bahasa Belanda disebut *rechtsonderzoek*.[1]

Skripsi ini menggunakan penelitian yuridis normatif, yang mana dilakukan dengan cara meneliti bahan – bahan pustaka berupa asas – asas hukum, sistematika hukum, taraf sinkronisasi vertikal dan horizontal, perbandingan hukum serta sejarah hukum.[2] Dalam penelitian ini, penulis akan menganalisa tentang legalitas larangan penggunaan jilbab bagi pekerja perempuan muslim yang bekerja di Perancis berdasarkan perspektif hukum internasional dan perlindungan hukum bagi pekerja perempuan muslim yang mengalami diskriminasi terkait larangan penggunaan jilbab pada saat bekerja di Perancis berdasarkan perspektif hukum nasional dan hukum internasional. Yang mana terdapat pertentangan hukum yaitu aturan yang diterapkan oleh perusahaan belum diatur oleh perundang – undangan negara dan bertentangan dengan Deklarasi Hak Asasi Manusia di Eropa.

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1 Dyah Ochtorina Susanti dan A'an Efendi, **Penelitian Hukum (Legal Research)**, Sinar Grafika, Jakarta, 2014, hlm. 1

2 *Ibid*., hlm. 19

## B. Pendekatan Penelitian Hukum

Skripsi ini menggunakan pendekatan perundang – undangan (*statute approach*) dan pendekatan kasus (*case approach*). *Statute approach* dilakukan dengan cara menelaah semua undang – undang dan regulasi yang berhubungan dengan isu hukum yang sedang diteliti.[3] Seperti konvensi internasional yang mengatur tentang HAM dan Undang – Undang nasional negara Perancis yang mengatur tentang ketenagakerjaan. *Case Approach* dilakukan dengan cara menggunakan putusan hakim sebagai sumber hukum yang telah memiliki kekuatan hukum tetap.[4] Terutama pada bagian *ratio decendi* atau alasan mengapa putusan tersebut diputuskan. Kasus yang digunakan yaitu kasus yang terjadi antara Asma Bougnaoui vs Micropole.

## C. Jenis dan Sumber Bahan Hukum

1. Bahan Hukum Primer
    1.1. *Universal Declaration of Human Rights*
    1.2. *Convention on the Elimination of All Forms of Discrimination Against Woman 1979*
    1.3. *International Covenant on Civil and Political Rights*
    1.4. *European Convention of Human Rights*
    1.5. *Directive 2000/78/EC*
    1.6. *Code du Travail*

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3 *Ibid*., hlm. 110
4 *Ibid*., hlm. 119

2. Bahan Hukum Sekunder

   Berupa penjelasan dari konvensi internasional dan peraturan perundang – undangan yang digunakan sebagai bahan hukum primer, buku literature atau bacaan yang berhubungan dengan rumusan masalah, hasil – hasil penelitian terdahulu yang berhubungan, pendapat ahli, serta artikel atau tulisan dari para ahli.

3. Bahan Hukum Tersier

   Bersumber dari Kamus dan Ensiklopedia

**D. Teknik Pengumpulan Bahan Hukum**

Pengumpulan bahan hukum dalam penelitian ini dilakukan dengan cara, teknik studi kepustakaan (*library research*) dengan cara mencari peraturan perundang – undangan yang berkaitan dengan permasalahan, buku, jurnal internasional, penelitian terdahulu serta artikel. Selain itu penelusuran data dilakukan melalui internet guna menunjang penelitian ini.

**E. Teknik Analisa Bahan Hukum**

Penelitian ini menggunakan teknik analisa berupa interpretasi atau penafsiran, berupa;

1. Interpretasi gramatikal adalah metode penafsiran atau penjelasan yang sederhana untuk mengetahui makna yang terkandung dalam ketentuan Undang – Undang dengan cara menguraikan menurut susunan kata, bahasa, atau bunyinya dalam keseharian dan harus logis.[5]

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[5] Syamsul Fatoni, ***Pengantar Logika Hukum***, Imsa Media Utama, Surabaya, 2008, hlm. 40

2. Interpretasi sistematis adalah metode penafsiran dengan melihat susunan yang berhubungan dengan pasal – pasal lainnya dalam undang – undang atau ketentuan lainnya yang mana menafsirkan Undang – Undang tidak boleh menyimpang atau keluar dari sistem perundangan.[6]

## F. Definisi Konseptual

a. Legalitas bermakna segala jenis aturan yang mengatur tentang diskriminasi terhadap perempuan berjilbab yang bekerja di perusahaan di Perancis dari sisi hukum internasional dan hukum nasional negara tersebut.

b. Diskriminasi terhadap perempuan berarti setiap pembedaan, pengucilan, dan/atau pembatasan yang dibuat berdasarkan jenis kelamin seperti yang mempunyai pengaruh dan tujuan untuk mengurangi, menghapuskan pengakuan, penikmatan atau penggunaan hak – hak perempuan dan kebebasan – kebebasan pokok di bidang ekonomi, agama, sosial dan budaya oleh kaum perempuan terlepas dari status perkawinan mereka.[7]

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6 *Ibid*., hlm. 42

7 *Article 1 Convention on The Elimination of All Forms of Discrimination Against Women 1979*

# BAB IV

# HASIL DAN PEMBAHASAN

## A. Legalitas Larangan Penggunaan Jilbab Bagi Perempuan Muslim Yang Bekerja Di Perancis Berdasarkan Perspektif Hukum Internasional

Perancis merupakan tempat bagi sebagian komunitas Muslim di Eropa, yang mana populasi Muslim terus meningkat dalam beberapa tahun mendatang.[1] Bahkan agama islam merupakan agama terbesar kedua setelah Katolik.[2] Dengan jumlah muslim sekitar 8,8 %, Islam dipandang sebagai sebuah ancaman bagi negara Perancis yang menganut prinsip sekularisme[3]. Prinsip sekularisme yang dianut Perancis dikenal dengan sebutan "*laïcité*" dan negara telah menganggap negaranya sebagai Republik Sekuler sejak Revolusi Perancis pada 1789.[4] *Laïcité* merupakan perwujudan dari prinsip – prinsip dasar Republik Perancis yaitu, *Liberté* (kebebasan), *Egalité* (kesetaraan), *Fraternité* (persaudaraan).[5]

Prinsip sekularisme tersebut tercantum dalam *article 1* dan *article 2 Loi du 9 Décembre 1905 Concernant La Séparation Des Églises Et De*

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1 *Pew Research Center*, ***Keyword: Table Muslim Population by Country***, Sumber: http://www.pewforum.org/2011/01/27/table-muslim-population-by-country/ , diakses pada 8 September 2018 Pukul 17.34 WIB

2 *Pew Research Center*, ***Keyword: 5 Facts about the Msulim population in Europe***, Sumber: http://www.pewresearch.org/fact-tank/2017/11/29/5-facts-about-the-muslim-population-in-europe/ , diakses pada 8 September 2018 Pukul 17.38 WIB

3 Prinsip Sekualrisme adalah sebuah ideology yang memisahkan antara aturan agama atau kepercayaan dan Negara, namun tetap menjamin hak kebebasan beragama atau berkeyakinan

4 Lina Ragep Powell, *Spring* 2013, ***The Constitutionality of France's Ban on the Burqa In Light of the European Convention's Arslan V. Turkey Decision on Religious Freedom***, *Wisconsin International Law Journal*, Vol. 31 Issue 1, p118 – 146. 29p, *Spring* 2013, hlm. 122

5 Elizabeth Adair, ***Thessis: Liberté, Egalité, Laïcité?: Defining French National Identity***, United States of America, 2014

*L'État* (Hukum 9 Desember 1905 Mengenai Pemisahan Gereja – Gereja dan Negara). *Article 1 Loi du 9 Décembre 1905 Concernant La Séparation Des Églises Et De L'État* menyatakan,

> "*La République assure la liberté de conscience, Elle garantit le libre exercice des cultes sous les seules restrictions édictées ci - après dans l'intérêt de l'ordre public*".[6]

*Article 2 Loi du 9 Décembre 1905 Concernant La Séparation Des Églises Et De L'État* menyatakan [7],

> "*La République ne reconnaît, ne salarie ni ne subventionne aucun culte, En conséquence, à partir du 1er janvier qui suivra la promulgation de la présente loi, seront supprimées des budgets de l'État, des départements et des communes, toutes dépenses relatives à l'exercice des cultes*."
> *"Pourront toutefois être inscrites auxdits budgets les dépenses relatives à des services d'aumônerie et destinées à assurer le libre exercice des cultes dans les établissements publics tels que lycées, collèges, écoles, hospices, asiles et prisons*."
> "*Les établissements publics du culte sont supprimés, sous réserve des dispositions énoncées à l'article* 3".

Berdasarkan aturan tersebut, Perancis mengadopsinya ke dalam konstitusi yang bernama *Constitution du 4 Octobre 1958* (Konstitusi Perancis). Hal ini tercantum dalam *article 1 Constitution du 4 Octobre 1958* yang menyatakan[8],

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6 *Article 1 LOI DU 9 DÉCEMBRE 1905 CONCERNANT LA SÉPARATION DES ÉGLISES ET DE L'ÉTAT*, Terjemahan: Republik menjamin kebebasan hati nurani. Ini untuk menjamin pelaksanaan agama secara bebas di bawah ketentuan yang diberlakukan selanjutnya demi kepentingan ketertiban umum.

7 *Article 2 LOI DU 9 DÉCEMBRE 1905 CONCERNANT LA SÉPARATION DES ÉGLISES ET DE L'ÉTAT*, Terjemahan: Republik tidak mengakui, membayar atau mensubsidi agama apapun. Akibatnya, mulai tanggal 1 Januari setelah pengundangan undang – undang ini, akan ditekan anggaran negara, departemen dan komune, semua biaya yang berkaitan dengan kultus. Namun, biaya yang berkaitan dengan layanan kapelan dan dimaksudkan untuk memastikan latihan agama gratis di lembaga lembaga public seperti sekolah menengah, perguruan tinggi, sekolah, rumah perawatan, rumah sakit jiwa dan penjara dapat dimasukkan dalam anggaran tersebut. Lembaga agama public dihapuskan, tunduk pada ketentuan yang diatur dalam Pasal 3

8 *Article 1 Constitution du Octobre 1958*, Terjemahan: Perancis akan menjadi Republik yang tidak dapat dibagi, sekuler, demokratis dan sosial. Itu harus memastikan kesetaraan semua warga negara di hadapan hukum, tanpa membedakan asal, rasa atau agama. Itu

> "*La France est une République indivisible, laïque, démocratique et sociale, Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion, Elle respecte toutes les croyances, Son organisation est décentralisée*."
> "*La loi favorise l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives, ainsi qu'aux responsabilités professionnelles et sociales*".

Dengan berdasarkan konstitusi tersebut, pada tahun 2004 Perancis membuat aturan tentang pelarangan pemakaian simbol - simbol keagamaan di sekolah – sekolah umum.[9] Pada awalnya Prancis melarang jilbab di sekolah umum dengan alasan bahwa, Perancis merupakan masyarakat sekuler, yang mana simbol – simbol keagamaan di sekolah umum dan di lembaga – lembaga publik yang dikenakan oleh pejabat publik menyinggung sekularisme Perancis. Sehingga pemerintah Perancis menekankan bahwa undang – undang ini berlaku untuk semua simbol agama tanpa terkecuali. Undang – Undang ini menempatkan pembatasan pada apa yang seseorang dapat pakai di "ruang publik", yang dimaksud ruang publik yaitu terbatas pada perusahaan yang diatur pemerintah, seperti sekolah dan institusi.[10]

Sejak disahkannya undang – undang terkait larangan pemakaian jilbab di Perancis, perempuan muslim di Perancis menghadapi kesulitan dalam beberapa bidang kehidupan, salah satunya adalah mencari pekerjaan. Akibat dari kebijakan tersebut, beberapa pengusaha di Perancis, mulai memperkenalkan peraturan internal atau menerapkan kebijakan

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harus menghormati semua keyakinan. Ini harus diorganisir berdasarkan desentralisasi. Undang - Undang akan mempromosikan akses yang sama oleh perempuan dan laki – laki untuk jabatan dan jabatan elektif serta posisi professional dan sosial.

9 *Application de La Loi du 15 Mars 2004 Sur Le Port Des Signes Religieux Ostensibles Dans Les Établissements D'Enseignement Publics*

10 *Article 1 LOI n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*

informal yang melarang pemakaian simbol – simbol agama, budaya dan politik serta cara berpakaian dengan tujuan untuk menegakkan konsep netralitas.

Salah satu kasus yang berhubungan dengan pemecatan tenaga kerja perempuan muslim akibat memakai jilbab pada saat bekerja di sebuah perusahaan terjadi di Perancis. Kasus tersebut terjadi pada salah satu karyawan yang bernama Asma Bougnaoui. Bougnaoui magang di sebuah perusahaan bernama Micropole pada 4 Februari 2008. Pada awalnya Bougnaoui hanya mengenakan bandana sederhana, yang kemudian berubah menjadi jilbab. Sebelum direktrut, Micropole telah memberi tahu Bougnaoui bahwa pemakaian jilbab mungkin akan menimbulkan masalah ketika dia berhubungan dengan pelanggan perusahaan. Setelah masa magangnya berakhir, Micropole mempekerjakannya dari mulai 15 Juli 2008 sebagai insinyur desain di bawah kontrak kerja dengan durasi yang tidak terbatas.

Bougnaoui diberhentikan dengan surat pada tanggal 22 Juni 2009, setelah dipanggil pada 15 Juni 2009 untuk wawancara awal kemungkinan pemecatan. Surat tersebut menyatakan, “sebagai bagian dari tugas anda, anda dipanggil oleh pelanggan untuk bekerja di tempat pelanggan pada tanggal 15 Mei. Setelah menyelesaikan pekerjaan tersebut, pelanggan memberi tahu Micropole bahwa saudara Bougnaoui mengenakan jilbab setiap hari, sehingga mengganggu sejumlah karyawan di kantor pelanggan. Kantor pelanggan tersebut juga meminta agar tidak mengenakan jilbab di lain waktu. Ketika anda direkrut oleh perusahaan Micropole, dalam

wawancara anda dengan Manajer Operasional dan Manajer Perekrutan, subjek yang mengenakan kerudung akan ditangani dengan jelas. Kami mengatakan kepada anda bahwa, kami sepenuhnya menghormati prinsip kebebasan berpendapat dan keyakinan agama setiap orang. Tetapi karena anda berhubungan secara internal atau eksternal dengan pelanggan perusahaan, anda tidak dapat mengenakan jilbab dalam semua keadaan. Dalam kepentingan bisnis dan untuk pengembangannya, kami berkewajiban untuk bertatap muka dengan pelanggan kami, untuk mensyaratkan bahwa kebijaksanaan diamati sebagai salam ekspresi preferensi pribadi karyawan kami.

Pada wawancara selanjutnya di tanggal 17 Juni, kami menegaskan kembali prinsip kebutuhan netralitas kepada anda dan kami meminta anda untuk menerapkannya dalam hal berhubungan dengan pelanggan kami. Kami bertanya lagi apakah anda dapat menerima persyaratan professional tersebut dengan menyetujui untuk tidak mengenakan jilbab dan anda menjawab negatif. Kami menganggap bahwa fakta – fakta tersebut membenarkan alasan untuk pengakhiran kontrak kerja anda. Sejauh posisi anda membuat tidak mungkin bagi anda untuk melaksanakan fungsi anda atas nama perusahaan. Mengingat sikap anda dalam memberikan layanan di tempat pelanggan kami. Anda tidak akan dapat mengetahui periode pemberitahuan anda. Karena kegagalan bekerja selama periode pemberitahuan disebabkan oleh anda, anda tidak akan dibayar untuk periode pemberitahuan anda. Kami menyesalkan situasi ini karena

kompetensi profesional anda. Padahal kami berharap untuk memiliki hubungan kerja jangka panjang mengingat potensi yang anda miliki".

Bougnaoui menganggap bahwa pemecatan itu bersifat diskriminatif dan membawa tindakan tersebut ke *The Conseil de Prud'hommes de Paris* (Pengadilan Buruh, Paris, Perancis) pada 8 September 2009. Sikap Bougnaoui tersebut juga didukung oleh ADDH (*Association de defense des droits de l'homme*)[11], yang secara sukarela ikut mengawal proses persidangan. Pada 4 Mei 2011, Pengadilan Buruh Paris memerintahkan Micropole untuk membayar kompensasi sehubungan dengan periode pemberitahuannya, karena telah gagal untuk menunjukkan dalam surat pemecatannya bahwa Bougnaoui melakukan dugaan pelanggaran. Serta menolak sisa tindakan dengan alasan bahwa pembatasan Bougnaoui untuk bebas mengenakan jilbab dibenarkan oleh kontaknya dengan pelanggan perusahaan itu dan sebanding dengan tujuan Micropole untuk melindungi citranya dan menghindari konflik dengan kepercayaan pelanggannya.

Tidak terima dengan putusan tersebut, Bougnaoui mengajukan banding atas putusan itu ke *The Cour d'appel de Paris* (Pengadilan Banding, Paris, Perancis). Dalam putusannya, bahwa pemecatan Bougnaoui tidak muncul dari diskriminasi yang terkait dengan keyakinan agama karyawannya, karena ia diizinkan untuk terus mengekspresikannya dalam usaha, dan bahwa itu dibenarkan oleh pembatasan yang sah yang timbul dari kepentingan usaha.

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11 Asosiasi untuk perlindungan Hak Asasi Manusia di Perancis

Tidak puas dengan putusan dari Pengadilan Banding tersebut, Bougnaoui dan ADDH membawa putusan tersebut ke *Cour de cassation* (Pengadilan Kasasi). *Cour de cassation* mengacu pada *Article 4 number 1 Directive 2000/78/EC* yang menyatakan,

1. *"Notwithstanding article 2 (1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate"*.[12]

Berdasarkan pasal di atas, *Cour de cassation* memutuskan bahwa keinginan perusahaan untuk memperhitungkan keinginan pelanggan tidak termasuk dalam layanan yang harus diberikan oleh perusahaan kepada pelanggan. Serta perusahaan juga tidak dapat menganggap bahwa pekerja yang mengenakan jilbab termasuk dalam persyaratan pekerjaan untuk bertemu dengan pelanggan.

Dari uraian kasus di atas, aturan hukum yang harus dipahami terlebih dahulu yaitu tercantum dalam *article 9 number 1* dan *number 2 European Convention on Human Rights* (yang selanjutnya disebut ECHR) dinyatakan bahwa setiap orang berhak atas kebebasan berpikir, hati nurani dan agama untuk mengubah agama atau keyakinannya serta mewujudkan agama atau keyakinannya dalam bentuk ibadah, pengajaran, praktik dan

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12 *Article 4 number 1 Directive 2000/78/EC*, Terjemahan: Meskipun Pasal 2 (1) dan (2), negara - negara anggota dapat menetapkan bahwa perbedaan perlakuan yang didasarkan pada karakteristik yang terkait dengan salah satu alasan sebagaimana dimaksud dalam Pasal 1 tidak merupakan diskriminasi di mana, dengan alasan sifat dari kegiatan kerja tertentu yang bersangkutan atau dari konteks di mana mereka dilaksanakan, karakteristik tersebut merupakan persyaratan pekerjaan yang asli dan menentukan, asalkan tujuan tersebut sah dan persyaratannya proporsional

pengamatan yang dilakukan secara pribadi, dalam komunitas atau di depan umum.[13] Sedangkan untuk kebebasan memanifestasikan agama atau keyakinan, seseorang harus tunduk terlebih dahulu pada hukum atau aturan yang ditentukan guna melindungi ketertiban umum, keselamatan masyarakat serta melindungi hak dan kebebasan orang lain.[14] Jaminan yang diberikan dari penikmatan hak dan kebebasan yang tercantum dalam ECHR yaitu dilakukan tanpa adanya diskriminasi atas dasar apapun.[15]

Agama yang dijelaskan dalam Konvensi ini memiliki makna yang sangat luas, dimana konsep mengenai agama harus ditafsirkan sebagai kenyataan bahwa, seseorang memiliki dan menganut sebuah kepercayaan atau keyakinan yang mana dapat mereka wujudkan dengan cara mengenakan pakaian agama yang sesuai dengan agama yang dianut, dan dikenakan di tempat umum.

Sehubungan dengan kebebasan beragama, hak kebebasan beragama mencangkup kebebasan untuk menetapkan agama atau kepercayaan berdasarkan pilihannya sendiri, kebebasan menunjukkan di tempat umum atau tertutup untuk menjalankan agama dan kepercayaannya

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13 *Article 9 number 1 European Convention on Human Rights* menyatakan, *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with other's and in public or private, to manifest his religion or belief, in worship, teaching, practice and observence*

14 *Article 9 number 2 European Convention on Human Rights* menyatakan, *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others*

15 *Article 14 European Convention on Human Rights* menyatakan, *The enjoyment off the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national, or social origin, association with a national minority, property, birth or other status*

dalam kegiatan ibadah, pentaatan, pengalaman dan pengajaran. Ketetntuan ini tercantum dalam *article 18 number 1* ICCPR. Dengan adanya aturan ini, kebebasan untuk memanifestasikan agama atau kepercayaan dalam ibadah, ketaatan, dan praktik tidak dapat dibatasi. Hal ini sejalan dengan yang ditafsirkan oleh *High Commissioner for Human Rights* (yang selanjutnya disebut dengan HRC) dalam *General Comment number 22: The Right to freedom of thought, conscience and religion*, yang mengatakan bahwa hak kebebasan untuk memanifestasikan agama atau kepercayaan tidak dapat dibatasi untuk alasan lain selain yang disebutkan dalam *article 18 number 3* ICCPR.[16]

Selain yang tercantum dalam ECHR dan ICCPR, aturan mengenai adanya larangan diskriminasi dalam berbisnis tercantum dalam *Treaty on European Union* (yang selanjutnya disebut TEU). TEU merupakan salah satu perjanjian utama dari Uni Eropa yang membentuk dasar hukum Uni Eropa dengan menetapkan prinsip – prinsip umum dari tujuan Uni Eropa, tata kelola lembaga – lembaga pusatnya, serta aturan – aturan tentang kebijakan eksternal, luar negeri dan keamanan.

*Article 3 number 3* TEU menyatakan bahwa, Uni Eropa akan membangun pasar internal yang bekerja untuk pembangunan berkelanjutan di Eropa, yang mana akan memerangi pengucilan sosial dan diskriminasi serta mempromosikan keadilan, perlindungan sosial, kesetaraan dan

16 *General Comment No. 22: The Right to Freedom of Thought, Conscience, and Religion*, Sumber: http://www.equalrightstrust.org/ertdocumentbank/general%20comment%2022.pdf

solidaritas.[17] Bahkan Uni Eropa juga harus menghormati keanekaragaman budaya dan bahasa, tetapi tetap menjaga warisan budaya Eropa itu sendiri. Sedangkan, *article 4 number 2* TEU menjelaskan bahwa Uni Eropa akan menghormati kesetaraan negara – negara anggota sebelum perjanjian, serta identitas nasional masing – masing negara anggota yang melekat dalam struktur fundamental politik dan konstitusional di segi pemerintahan lokal dan regional.[18] Serta menghormati fungsi penting negara – negara anggota dengan memastikan integritas wilayah negara, memelihara hukum dan ketertiban serta menjaga keamanan nasional.

Selain tercantum dalam ECHR, ICCPR dan TEU, aturan mengenai adanya larangan diskriminasi dalam berbisnis juga diatur dalam *Charter of Fundamental Rights of The European Union* (Piagam Hak Fundamental dari Uni Eropa). Aturan mengenai kebebasan berpikir, hati nurani dan agama tercantum dalam *Article 10 number 1 Charter of Fundamental Rights of The European Union*.[19] Sedangkan, kebebasan untuk melakukan

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17 *Article 3 number 3 Treaty on European Union* menyatakan, *The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, sosial and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguard and enhanced*

18 *Article 4 number 2 Treaty on European Union* menyatakan, *The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self government. It shall respect their essential State function, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.*

19 *Article 10 number 1 Charter of Fundamental Rights of The European Union* menyatakan,

bisnis tercantum dalam *Article 16* yang mana kebebasan untuk melakukan usaha sesuai dengan hukum Uni Eropa dan hukum nasional diakui.[20] Untuk aturan *non – discrimination* diatur dalam *Article 21* yang mana menyatakan bahwa diskriminasi apapun atas dasar kebangsaan harus dilarang.

Di Eropa, terdapat undang – undang hukum Uni Eropa tentang kesetaraan ketenagakerjaan yang mengharuskan semua negara anggota Uni Eropa untuk melarang pengusaha melakukan diskriminasi atas dasar agama atau keyakinan, cacat, usia atau orientasi seksual yang tercantum dalam *Directive 2000/78*. Hal ini sejalan dengan yang tercantum dalam *article 1 Directive 2000/78/EC* yang menyatakan,

> "*The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment*".[21]

Untuk konsep mengenai diskriminasi tercantum dalam *article 2 number 2 of Directive 2000/78/EC* yang menyatakan,

a. "*Direct discrimination shall be taken or occur where one person is treated less favourably than another is, has been or would be*

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1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

20 *Article 10 number 1 Charter of Fundamental Rights of The European Union* menyatakan, The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

21 *Article 1 Directive 2000/78/EC*, Terjemahan: Tujuan dari petunjuk ini adalah untuk meletakkan kerangka kerja umum untuk memerangi diskriminasi atas dasar agama, atau keyakinan, cacat, usia atau orientasi seksual dalam hal pekerjaan dan jabatan, dengan maksud untuk memberlakukan prinsip perlakuan yang sama di negara – negara anggota

*treated in a comparable situation, on any of the grounds referred to in Article 1*".[22]

b. "*Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless*"[23],

(i) *"that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary or"*

(ii) *"as regards persons with a particular disability, the employer or any person or organization to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice*".

Berdasarkan *Article 2 number 5 Directive 2000/78/EC* petunjuk ini harus ditetapkan oleh hukum nasional yang diperlukan untuk melindungi keamanan publik, pemeliharaan ketertiban umum, pencegahan pelanggaran pidana, perlindungan kesehatan, dan untuk perlindungan hak – hak dan kebebasan orang lain. Cakupan dari *Directive 2000/78/EC* berlaku untuk semua orang, baik dalam sektor publik dan swasta, termasuk badan publik dalam kaitannya dengan;

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22 *Article 2 number 2 (a) Directive 2000/78/EC*, Terjemahan: Diskriminasi langsung harus terjadi di mana satu orang diperlakukan kurang menguntungkan daripada yang lain, telah atau akan diperlakukan dalam situasi yang sebanding, atas dasar apapun yang dirujuk dalam Pasal 1

23 *Article 2 number 2 (b) Directive 2000/78/EC*, Terjemahan: Diskriminasi tidak langsung akan terjadi apabila ketentuan, kriteria atau praktik yang tampaknya netral akan menempatkan orang – orang yang memiliki agama atau kepercayaan tertentu, kecacatan tertentu, usia tertentu atau orientasi seksual tertentu pada kerugian tertentu dibandingkan dengan orang lain kecuali:

a. Ketentuan, kriteria, atau praktik tersebut secara objektif dibenarkan oleh tujuan yang sah dan cara mencapai tujuan tersebut adalah tepat dan perlu atau

b. Berkaitan dengan orang – orang dengan kecacatan tertentu, pemberi kerja atau orang atau organisasi yang kepadanya Peraturan ini berlaku diwajibkan di bawah undang – undang nasional, untuk mengambil langkah – langkah yang tepat sesuai dengan prinsip – prinsip yang terkandung dalam Pasal 5, untuk mennghilangkan kerugian yang ditimbulkan oleh ketentuan, kriteria atau praktek tersebut

a. kondisi untuk akses ke pekerjaan, untuk wirausaha atau pekerjaan, termasuk kriteria seleksi dan kondisi perekrutan, apapun cabang kegiatan dan di semua tingkat hirarki professional termasuk promosi
b. akses ke semua jenis dan ke semua tingkatan bimbingan kejuruan, pelatihan kerja, pelatihan kejuruan lanjutan dan pelatihan kembali, termasuk pengalaman kerja praktis
c. pekerjaan dan kondisi kerja termasuk pemecatan dan pembayaran

Sedangkan aturan mengenai persyaratan kerja tercantum dalam *Article 4 Directive 2000/78/EC* yang menyatakan,

1. *"Notwithstanding article 2 (1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular ocupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate"*.[24]
2. *"Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churhes and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos, This difference of treatment shall be implemented taking account of*

[24] *Article 4 number 1 Directive 2000/78/EC*, Terjemahan: Meskipun Pasal 2 (1) dan (2), negara - negara anggota dapat menetapkan bahwa perbedaan perlakuan yang didasarkan pada karakteristik yang terkait dengan salah satu alasan sebagaimana dimaksud dalam Pasal 1 tidak merupakan diskriminasi di mana, dengan alasan sifat dari kegiatan kerja tertentu yang bersangkutan atau dari konteks di mana mereka dilaksanakan, karakteristik tersebut merupakan persyaratan pekerjaan yang asli dan menentukan, asalkan tujuan tersebut sah dan persyaratannya proporsional

> *Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground*".[25]

Persyaratan kerja yang dimaksud dalam *Article 4 Directive 2000/78/EC* yaitu negara – negara anggota dapat menetapkan bahwa perbedaan perlakuan yang didasarkan pada karakteristik yang tercantum dalam *Article 1 Directive 2000/78/EC* tidak merupakan diskriminasi asalkan alasan dari sifat kegiatan kerja tertentu itu dilaksanakan dengan memiliki karakteristik seperti menentukan persyaratan pekerjaan yang asli dengan tujuan yang sah dan proporsional.

Hukum ketenagakerjaan di Perancis tercantum dalam *Code du Travail* atau Hukum Ketenagakerjaan. Aturan hukum tentang diskriminasi di tempat kerja, di Perancis tercantum dalam *Article L. 1121-1, Article L. 1132-1, Article L. 1133-1, Article L. 1321-3 Code du Travail* (Undang – Undang Ketenagakerjaan Perancis), yang menyatakan,

1. "*L 1121-1, Nul ne peut apporter aux droits des personnes et aux libertés individuelles et collectives de restrictions qui ne seraient*

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25 *Article 4 number 2 Directive 2000/78/EC*, Terjemahan: Negara – negara anggota dapat mempertahankan perundang – undangan nasional yang berlaku pada tanggal instruksi ini diadopsi atau menyediakan undang – undang yang akan datang yang menggabungkan praktik – praktik nasional yang ada pada tanggal instruksi ini diadopsi sesuai dengan yang dalam hal kegiatan kerja dalam gereja dan organisasi public atau swasta lainnya, etos yang didasarkan pada agama atau keyakinan, perbedaan perlakua berdasarkan agama atau keyakinan seseorang tidak akan merupakan diskriminasi di mana, dengan alasan sifat dari kegiatan ini atau dari konteks di mana mereka dilakukan, agama atau keyakinan seseorang merupakan persyaratan pekerjaan yang sah, sah dan dibenarkan dengan memperlihatkan etos organisasi. Perbedaan perlakuan ini harus dilaksanakan dengan mempertimbangkan ketentuan dan prinsip konstitusional negara anggota, serta prinsip – prinsip umum hukum Uni Eropa dan tidak boleh membenarkan diskriminasi di tempat lain. Asalkan ketentuannya dipatuhi, instruksi ini tidak akan merugikan hak gereja dan organisasi public atau swasta lainnya, etos yang didasarkan pada agama atau keyakinan, bertindak sesuai dengan konstitusi nasional dan undang – undang, untuk mengharuskan individu yang bekerja bagi mereka untuk bertindak dengan itikad baik dan dengan kesetiaan pada etos organisasi.

*pas justifiées par la nature de la tâche à accomplir ni proportionnées au but recherché*".[26]

2. "*L 1132-1, Aucune personne ne peut être écartée d'une procédure de recrutement ou de l'accès à un stage ou à une période de formation en entreprise, aucun salarié ne peut être sanctionné, licencié ou faire l'objet d'une mesure discriminatoire, directe ou indirecte, telle que définie à l'article 1 de la loi n 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations, notament en matière de rémunération, au sens de l'article L 3221-3, de mesures d'intéressement ou de distribution d'actions, de formation, de reclassement, d'affectation, de qualification, de classification, de promotion professionnelle, de mutation ou de renouvellement de contrat en raison de son origine, de son sexe, de ses mœurs, de son orientation sexuelle, de son identité de genre, de son âge, de sa situation de famille ou de sa grossesse, de ses caractéristiques génétiques, de la particulière vulnérabilité résultant de sa situation économique, apparente ou connue de son auteur, de son appartenance ou de sa non-appartenance, vraie ou supposée, à une ethnie, une nation ou une prétendue race, de ses opinions politiques, de ses activités syndicales ou mutualistes, de ses convictions religieuses, de son apparence physique, de son nom de famille, de son lieu de résidence ou de sa domiciliation bancaire, ou en raison de son état de santé, de sa perte d'autonomie ou de son handicap, de sa capacité à s'exprimer dans une langue autre que le français*".[27]
3. "*L 1133-1, L'article L 1132-1 ne fait pas obstacle aux différences traitement, lorsqu'elles répondent à une exigence professionnelle essentielle et déterminante et pour autant que l'objectif soit légitime et l'exigence proportionnée*".[28]

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26 *Article L. 1121-1 Code du Travail*, Terjemahan: Tidak seorang pun dapat membatasi hak pribadi atau kebebasan individu atau kolektif dengan pembatasan apapun yang tidak dibenarkan oleh sifat tugas yang harus dilakukan dan sebanding dengan tujuan yang dicari

27 *Aricle 1132-1 Code du Travail*, Terjemahan: Tidak ada orang yang dapat dikecualikan dari prosedur perekrutan atau dari pengalaman kerja atau periode pelatihan pada suatu usaha, Tidak ada karyawan yang dapat dikenakan sanksi, diberhentikan atau dikenakan perlakuan diskriminatif, baik langsung atau tidak langsung, sebagaimana didefinisikan dalam Pasal 1 Undang – Undang No. 2008-496 tanggal 27 Mei 2008 yang menetapkan berbagai ketentuan untuk membawa undang – undang anti diskriminasi yang sejalan dengan undang – undang Komunitas, khususnya mengenai remunerasi, dalam arti Pasal L. 3221-3, skema insentif atau pembagian karyawan, pelatihan, reklasifikasi, penugasan, kualifikasi, klasifikasi, promosi karier, transfer atau pembaruan kontrak awal, orientasi seksualnya, jenis kelamin, usia, status keluarga, karakteristik genetik, kepada kelompok etnis, bangsa atau ras yang ikut dalam sebuah keanggotaan, pendapat politiknya, serikat d agangnya atau aktifitas dewan kerjanya, keyakinan agamanya, penampilan fisiknya, nama keluarganya, tempat tinggalnya, atau karena keadaan kesehatannya, atau kecacatannya, kemampuan berbicara dalam bahasa selain bahasa Perancis

28 *Article L. 1133-1 Code du Travail*, Terjemahan: *Article L. 1132-1* tidak akan menghalangi perbedaan perlakuan yang timbul dari persyaratan kerja yang asli dan menentukan, asalkan tujuan tersebut sah dan persyaratannya proporsional

4. "*L 1321-3 Le règlement intérieur ne peut contenir, Des dispositions contraires aux lois et règlements ainsi qu'aux stipulations des conventions et accords collectifs de travail applicables dans l'entreprise l'établissement, Des dispositions apportant aux droits des personnes et aux libertés individuelles et collectives des restrictions qui ne seraient pas justifiées par la nature de la tâche à acompli proportionnées au but recherché, Des dispositions discriminant les salariés dans leur emploi ou leur travail, à capacité professionnelle égale, en raison de leur origine, de leur sexe, de leurs mœurs de leur orientation sexuelle ou identité de genre, de leur âge, de leur situation de famille ou de leur grossesse, de leurs caractéristiques génétiques, de leur appartenance ou de leur non-appartenance, vraie ou supposée, à une ethnie, une nation ou une race, de leurs opinions politiques, de leurs activités syndicales ou mutualistes de leurs convictions religieuses, de leur apparence physique, de leur nom de famille ou en raison de leur état de santé ou de leur handicap*".[29]

Seperti diketahui pekerja di Perancis terbagi dalam empat kategori yaitu *employee*, *agency workers*, *self employed*, dan *independent contractors*. *Employee* atau karyawan merupakan individu yang dipekerjakan berdasarkan kontrak kerja baik dengan jangka waktu tertentu ataupun tidak tertentu yang tunduk pada ketentuan *Code du Travail*.[30] *Agency Workers* atau Pekerja Agen merupakan pekerja yang dipekerjakan oleh perusahaan untuk bekerja pada perusahaan klien yang membutuhkan tenaga kerja

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29 *Article L. 1321-3 Code du Travail*, Terjemahan: Peraturan tempat kerja tidak boleh memuat: 1. Ketentuan yang bertentangan dengan hukum primer atau sekunder atau persyaratan yang ditetapkan oleh kesepakatan dan pemahaman bersama mengenai praktik kerja yang berlaku dalam usaha atau pendirian, 2.Ketentuan yang memaksakan pembatasan pada hak pribadi dan kebebasan individu dan kolektif yang tidak dibenarkan oleh sifat tugas yang harus dilakukan atau sebanding dengan tujuan yang ingin dicapai, 3. Ketentuan yang mendiskriminasi karyawan dalam pekerjaan mereka atau ditempat kerja mereka, memiliki kemampuan professional yang sama, dengan alasan asal mereka, jenis kelamin, perilaku mereka, orientasi seksual atau jenis kelamin, usia, status keluarga, karakteristik genetik, kepada kelompok etnis, bangsa atau ras yang ikut dalam sebuah keanggotaan, pendapat politiknya, serikat dagangnya atau aktifitas dewan kerjanya, keyakinan agamanya, penampilan fisiknya, nama keluarganya, tempat tinggalnya, atau karena keadaan kesehatannya, atau kecacatannya,

30 Joel Grangé, ***Employment and Employee Benefits in France: Overview***, Sumber: https://uk.practicallaw.thomsonreuters.com/0-503-0054?transitionType=Default&contextData=(sc.Default) , diakses pada 9 September 2018 Pukul 10.47 WIB

sementara.[31] *Self Employed* atau wiraswasta terdiri dari pekerja independen dengan ketrampilan khusus yang diakui negara tidak bekerja di bawah kontrak.[32] *Independent Contractors* atau kontraktor independen adalah kontraktor yang bekerja lebih dari satu klien dengan cara memberikan layanan atau jasa mengirim barang.[33] Bougnaoui termasuk dalam kategori *employee* karena dipekerjakan berdasarkan kontrak yang mengharuskan tunduk pada ketentuan *Code du Travail*.

Analisis dari kasus Bougnaoui ini dilihat dari jenis diskriminasinya terlebih dahulu. Seperti diketahui, diskriminasi terbagi menjadi dua yaitu diskriminasi yang terjadi secara langsung dan diskriminasi yang terjadi secara tidak langsung. Diskriminasi yang terjadi secara tidak langsung melarang perilaku yang berhubungan dengan anggapan 'netral', padahal tetap memiliki efek diskriminatif pada orang atau kelompok karena alasan yang dilarang.[34] Fokus dari diskriminasi tidak langsung terletak pada efek perilaku yang akan menghasilkan seseorang atau kelompok yang diperlakukan secara berbeda.[35]

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31 Joel Grangé, ***Employment and Employee Benefits in France: Overview***, Sumber: https://uk.practicallaw.thomsonreuters.com/0-503-0054?transitionType=Default&contextData=(sc.Default) , diakses pada 9 September 2018 Pukul 10.47 WIB

32 Joel Grangé, ***Employment and Employee Benefits in France: Overview***, Sumber: https://uk.practicallaw.thomsonreuters.com/0-503-0054?transitionType=Default&contextData=(sc.Default) , diakses pada 9 September 2018 Pukul 10.47 WIB

33 Joel Grangé, ***Employment and Employee Benefits in France: Overview***, Sumber: https://uk.practicallaw.thomsonreuters.com/0-503-0054?transitionType=Default&contextData=(sc.Default) , diakses pada 9 September 2018 Pukul 10.47 WIB

34 Millie Jane Turner, Disertasi: ***Discrimination in the workplace: Authenticity and the Genuine Occupational Qualification Exception***, New Zealand: University of Otago, 2014, hlm. 5

35 Millie Jane Turner, Disertasi: ***Discrimination in the workplace: Authenticity and the***

Sedangkan, untuk diskriminasi langsung, terdapat banyak pengecualian, baik secara umum maupun secara khusus.[36] Pengecualian secara khusus yang dimaksud yaitu dengan menunjukkan bahwa nilai – nilai atau kepentingan sosial lainnya kadang – kadang berlaku.[37] Misalnya, dalam ajaran agama katolik, hanya laki – laki saja yang dapat menjadi imam, sedangkan yang perempuan tidak diperbolehkan. Pengecualian secara umum lebih fleksibel dalam ruang lingkupnya, tetapi dilaksanakan atas kebijaksanaan pengadilan atau tribunal.[38] Misalnya, pengusaha dapat menolak mempekerjakan perawat laki - laki karena mereka tidak memenuhi syarat, atau karena pekerjaan tersebut hanya cocok untuk perempuan saja.

Dalam prakteknya, diskriminasi mengganggu pelaksanaan hak asasi manusia lainnya seperti hak untuk bekerja, hak untuk kebebasan berekspresi, hak untuk kebebasan beragama, serta hak atas pendidikan. Mengingat hukum internasional dan hukum Eropa sudah melarang pelaksanaan kedua diskriminasi tersebut. Negara berkewajiban untuk menjamin hak atas non – diskriminasi dengan cara menempatkan undang –

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***Genuine Occupational Qualification Exception***, New Zealand: University of Otago, 2014, hlm. 6

36 Millie Jane Turner, Disertasi: ***Discrimination in the workplace: Authenticity and the Genuine Occupational Qualification Exception***, New Zealand: University of Otago, 2014, hlm. 6

37 Millie Jane Turner, Disertasi: ***Discrimination in the workplace: Authenticity and the Genuine Occupational Qualification Exception***, New Zealand: University of Otago, 2014, hlm. 6

38 Millie Jane Turner, Disertasi: ***Discrimination in the workplace: Authenticity and the Genuine Occupational Qualification Exception***, New Zealand: University of Otago, 2014, hlm. 6

undang yang efektif, langkah – langkah kebijakan, ganti rugi dan sanksi bagi diskriminasi yang terjadi di sektor swasta.[39]

Menurut opini Advokat General Sharpston, pemecatan yang terjadi pada Bougnaoui termasuk diskriminasi langsung. Hal ini dikarenakan tidak adanya aturan yang ditetapkan dalam peraturan tempat kerja yang melarang karyawan menggunakan pakaian yang menunjukkan tanda – tanda agama ketika melakukan kontak dengan pelanggan.[40] Pemecatan Bougnaoui tidak didasarkan pada keberadaan aturan internal seperti itu, sehingga perlu untuk ditentukan apakah keinginan perusahaan untuk memperhitungkan keinginan pelanggan yang dilakukan oleh pekerja yang mengenakan jilbab dibenarkan untuk tujuan dari *Article 4 number 1 Directive 2000/78/EC*.

Aturan tersebut menetapkan bahwa perbedaan perlakuan yang dilarang oleh *Article 4 number 1 Directive 2000/78* tidak merupakan diskriminasi dengan alasan seperti sifat dari kegiatan kerja tertentu yang bersangkutan atau dari konteks di mana mereka dilaksanakan, karakteristik tersebut merupakan persyaratan pekerjaan yang asli dan menentukan, asalkan tujuannya sah dan persyaratannya proporsional. Padahal dalam keadaan yang sangat terbatas, karakteristik yang berkaitan dengan agama dapat merupakan persyaratan pekerjaan yang asli dan menentukan jika dilihat secara objektif berdasarkan sifat kegiatan kerja dan tidak mencakup

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39 *Article 2 General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004)*

40 *Court of Justice the European Union*, *Case Number* = C – 188/15, Sumber: http://curia.europa.eu/juris/document/document.jsf?text=&docid=181584&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=463304, diakses pada 10 September 2018 Pukul 8.23 WIB

pertimbangan subjektif seperti keinginan pengusaha untuk memperhitungkan keinginan khusus pelanggan.

Dalam kasus ini juga, para pengusaha tersebut tidak berpendapat bahwa jilbab yang digunakan oleh Bougnaoui mempengaruhi kemampuan mereka untuk melaksanakan pekerjaan mereka. Sehingga bisa dikatakan bahwa pengusaha yang berkuasa tidak dapat memecat siapapun hanya karena apa yang mereka pakai pada saat bekerja.

Berdasarkan asas legalitas yang tercantum dalam *article 8 Déclaration des Droits de l'homme et du Citoyen Du de 1789* yang menyatakan

> "*La Loi ne doit établir que des peines strictement et évidemment nécessaires, et nul ne peut être puni qu'en vertu d'une Loi établie et promulguée antérieurement au délit, et légalement appliqué*".

Dengan adanya aturan ini, undang – undang harus menetapkan hukuman yang secara tegas dan jelas diperlukan, dan tidak seorang pun dapat dihukum kecuali hukum yang ditetapkan dan disebarluaskan sebelum pelanggaran sudah diterapkan secara sah. Sehingga aturan mengenai larangan penggunaan jilbab bagi perempuan muslim yang bekerja di Perancis terutama yang bekerja pada sektor swasta adalah aturan *illegal*. Hal ini sejalan dengan yang tercantum dalam *Directive 2000/78* yang menyatakan bahwa perusahaan memiliki kebebasan untuk menerapkan bisnis sesuai dengan hukum Uni Eropa dan hukum nasional yang berlaku. Selain itu undang – undang, peraturan dan ketentuan administrative yang bertentangan dengan prinsip *equal treatment* (perlakuan yang sama) harus

dihapuskan dan setiap ketentuan yang bertentangan dengan prinsip *equal treatment* yang termasuk dalam kontrak atau perjanjian bersama, aturan internal perusahaan atau aturan yang mengatur pekerja dan pengusaha dapat dinyatakan batal dan tidak berlaku.

Di Perancis, hubungan hukum antara hukum internasional dan hukum nasional menganut paham monisme. Paham monisme ini melihat HI dan HN merupakan satu sistem kesatuan hukum yang mengikat terhadap individu – individu dalam suatu negara atau terhadap negara – negara dalam masyarakat internasional.[41] Paham monism yang dianut yaitu paham monism dengan primat hukum internasional. Paham monism dengan primat hukum internasional ini menganggap bahwa hukum nasional bersumber dari hukum internasional yang secara hierarki lebih tinggi. Bahkan hukum nasional tunduk pada hukum internasional dan kekuatan mengikatnya berdasarkan suatu pendelegasian wewenang dari hukum internasional.

Dalam konstitusi Perancis, bahwa ketentuan – ketentuan hukum internasional merupakan bagian dari hukum nasional. Hal ini dikarenakan ketentuan hukum internasional kedudukannya lebih tinggi daripada undang – undang nasional dan langsung menimbulkan hak dan kewajiban bagi penduduk di negara Perancis. Dalam sistem hukum Perancis tidak mempersoalkan transformasi perjanjian internasional ke dalam hukum nasional, karena menurut sistem hukum Perancis, pengesahan perjanjian

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41 Boer Mauna, **Hukum Internasional Pengertian Peranan dan Fungsi Dalam Era Dinamika Global**, PT. Alumni, Bandung, 2015, hlm. 12

dan pengumuman resmi sudah cukup sebagai syarat suatu perjanjian internasional merupakan bagian dari hukum nasional.

Di dalam praktik di pengadilan internasional menunjukkan bahwa, suatu negara tidak dapat menggunakan hukum nasionalnya yang bertentangan dengan hukum internasional sebagai alasan untuk menjustifikasi pelanggaran hukum internasional yang dilakukannya pada pihak lain.[42] Selain itu, suatu negara juga tidak dapat menggunakan alasan kekosongan hukum nasionalnya untuk menjustifikasi pelanggaran hukum internasional yang dilakukannya pada pihak lain.[43] Mengenai tanggung jawab internasionalnya, dapat timbul hanya ketika negara tersebut gagal untuk memenuhi kewajiban internasional.

Di depan pengadilan internasional, hukum nasional dapat diajukan sepanjang tidak bertentangan dengan hukum internasional. Dan juga hukum nasional dapat diajukan sebagai bukti adanya praktik hukum kebiasaan internasional. Namun, pengadilan internasional tidak berhak menyatakan bahwa hukum nasional suatu negara *valid* atau *invalid* karena hal itu adalah urusan dalam negeri negara yang bersangkutan. Sehingga dapat dikatakan kedudukan hukum internasional lebih tinggi dibandingkan hukum nasional di depan pengadilan internasional. Dalam praktik status dan perlakuan terhadap hukum internasional berbeda – beda di setiap negara.

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42 *Article 27 Vienna Convention 1969*, yang meyatakan, *A party may not invoke the provisions of its internal law as justification for ots failure to perform a treaty. This rule is without prejudice to article 46*

43 Sefriani, **Hukum Internasional Suatu Pengantar**, PT. Raja Grafindo Persada, Depok, 2017, hlm. 77

Sebagaimana dijelaskan sebelumnya, hukum nasional tidak berpengaruh pada kewajiban negara di tingkat internasional, tetapi hukum internasional juga tidak bisa mengabaikan hukum nasional suatu negara. Dalam praktik sesungguhnya, hukum internasional dan hukum nasional saling membutuhkan dan mempengaruhi satu sama lain seperti:

1. Hukum internasional akan efektif jika ditransformasikan terlebih dahulu ke dalam hukum nasional suatu negara
2. Hukum internasional menjembatani penerapan hukum nasional karena adanya keterbatasan yurisdiksi negara dalam mengimplementasikan hukum nasionalnya
3. Hukum internasional dapat menyatukan perbedaan – perbedaan dalam hukum nasional, sehingga dapat dikatakan hukum internasional dapat dijadikan acuan atau parameter untuk membuat sebuah aturan
4. Hukum internasional banyak tumbuh dan berkembang dari praktik hukum nasional negara – negara
5. Meskipun setiap negara mempunyai *prescription jurisdiction* atau kewenangan untuk membuat peraturan perundang – undangan dalam hukum nasionalnya, namun negara tidak bisa membuat aturan perundang – undangan sesuka hati tanpa melihat pada aturan hukum internasional yang sudah ada.[44]

[44] Sefriani, **Hukum Internasional Suatu Pengantar**, PT. Raja Grafindo Persada, Depok, 2017, hlm. 91

Mengingat Perancis menandatangani dan meratifikasi instrument hukum internasional di bidang hak asasi manusia, kebijakan atau aturan yang melarang penggunaan simbol keagaamaan di Perancis, sebenarnya telah melanggar hak asasi manusia terutama terkait hak kebebasan memanifestasikan agama di ruang publik. Tetapi dikarenakan pengadilan internasional tidak berhak menyatakan bahwa hukum nasional suatu negara *valid* atau *invalid* maka Perancis tetap mempertahankan aturan penggunaan jilbab di ruang publik tersebut. Seperti yang diketahui bahwa UDHR dan ECHR bukan merupakan sebuah perjanjian melainkan sebagai bentuk rekomendasi, sehingga tidak secara langsung menciptakan kewajiban hukum bagi negara – negara.

Bahkan, Uni Eropa pun tidak dapat melarang Perancis untuk membuat aturan yang melarang penggunaan simbol keagamaan yang dalam hal ini berupa jilbab, yang dikenakan di ruang publik. Hal ini dikarenakan negara Perancis memiliki kedaulatan sendiri untuk membuat dan menerapkan aturan hukum nasional berdasarkan konstitusinya. Namun, guna melindungi warga negara yang tinggal di negara – negara anggota Uni Eropa seperti Perancis, Uni Eropa memiliki lembaga peradilan yang dapat menolong individu yang mengalami diskriminasi di negara asalnya. Lembaga peradilan tersebut adalah *European Court of Human Rights* (yang selanjutnya disebut ECtHR) dan *European Court of Justice* (yang selanjutnya disebut CJEU). Yang mana kedua lembaga tersebut sama – sama memberikan jaminan perlindungan kepada warga

negara yang mengalami tindakan diskriminasi di negara tempat individu tersebut tinggal.

## B. Perlindungan Hukum Bagi Pekerja Perempuan Muslim Yang Mengalami Diskriminasi Terkait Larangan Penggunaan Jilbab Pada Saat Bekerja Di Perancis Berdasarkan Perspektif Hukum Nasional dan Hukum Internasional

Uni Eropa atau *European Union* merupakan kelompok yang terdiri dari 28 negara independen, termasuk Perancis. Awal mula berdirinya dapat ditelusuri pada akhir masa Perang Dunia II, ketika para pemrakarsanya mencari cara terbaik untuk mencegah konflik. Dengan cara negara – negara anggota Uni Eropa diikat dengan serangkaian traktat yang telah mereka sepakati dan tanda tangani. Traktat yang telah disepakati tersebut kemudian diratifikasi oleh parlemen nasional masing – masing negara melalui referendum.

Untuk dapat menjadi anggota Uni Eropa, suatu negara harus memiliki demokrasi yang stabil yang menjamin dan menjunjung tinggi supremasi hukum, hak asasi manusia dan perlindungan terhadap kaum minoritas. Uni Eropa bukan merupakan sebuah negara federal ataupun sebuah organisasi internasional, tetapi merupakan badan otonom yang terdiri dari beberapa anggota. Negara anggota yang tergabung dalam Uni Eropa tetap menjadi negara berdaulat yang independen, hanya saja mereka mendelegasikan sebagian kuasa mereka dalam hal pengambilan keputusan kepada Uni Eropa untuk mengambil keputusan atas masalah – masalah tertentu yang melibatkan kepentingan bersama. Uni Eropa memiliki tiga

lembaga utama yaitu Parlemen Eropa, Dewan Uni Eropa dan Komisi Eropa. Adapun tugas dari Parlemen Eropa sebagai berikut[45]:

1. Parlemen Eropa bersama Dewan Uni Eropa bertanggung jawab untuk menyetujui perundang – undangan Eropa, sedangkan mengenai rancangan undang – undang diajukan oleh Komisi Eropa
2. Parlemen Eropa bersama Dewan Uni Eropa bertanggung jawab memberikan persetujuan atas anggaran tahunan Uni Eropa
3. Parlemen Eropa berkuasa untuk membubarkan Komisi Eropa
4. Parlemen Eropa mengangkat Ombudsman Eropa, yang menyelidiki keluhan warga negara mengenai keburukan administrasi lembaga – lembaga Uni Eropa

Berbeda dengan Parlemen Eropa yang mewakili warga negara Uni Eropa yang dipilih secara langsung oleh mereka, Dewan Uni Eropa hanya mewakili masing – masing negara anggota yang terdiri dari para menteri yang berasal dari pemerintahan nasional masing – masing negara anggota. Adapun tugas dari Dewan Uni Eropa sebagai berikut[46]:

1. Dewan Uni Eropa bersama dengan Parlemen Eropa bertanggung jawab menyetujui undang – undang dan mengambil keputusan mengenai berbagai macam kebijakan

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45 Sekilas Uni Eropa, Sumber: https://eeas.europa.eu/sites/eeas/files/eu_at_a_glance_jan_2017_ed_id.pdf , diakses pada 11 September 2018 pukul 13.47 WIB

46 Sekilas Uni Eropa, Sumber: https://eeas.europa.eu/sites/eeas/files/eu_at_a_glance_jan_2017_ed_id.pdf , diakses pada 11 September 2018 Pukul 13.47 WIB

2. Dewan Uni Eropa juga memegang tanggung jawab utama atas apa yang dilakukan oleh Uni Eropa dalam urusan luar negeri dan kebijakan keamanan bersama, berdasarkan panduan strategis yang sudah ditentukan oleh Dewan Eropa.

Dewan Uni Eropa (*Council of the European Union*) berbeda dengan Dewan Eropa (*European Council*). Dewan Eropa merupakan otoritas politik tertinggi dari Uni Eropa yang terdiri dari Kepala Negara atau Kepala Pemerintahan para anggota Uni Eropa. Dewan Eropa memiliki tugas untuk menetapkan arah dan prioritas Uni Eropa secara umum. Selain itu, terdapat juga sebuah lembaga yang bernama Komisi Eropa yang mempunyai tugas sebagai berikut[47]:

1. Komisi Eropa bertugas membuat rancangan undang – undang Eropa yang baru untuk disampaikan kepada Parlemen Eropa dan Dewan Uni Eropa
2. Komisi Eropa bertugas mengelola pelaksanaan harian kebijakan Uni Eropa dan pembelanjaan dana Uni Eropa
3. Komisi Eropa mengawasi agar semua pihak menaati traktat dan undang – undang Eropa
4. Komisi Eropa dapat menindak para pelanggar peraturan, serta menuntutnya ke Mahkamah Uni Eropa apabila diperlukan

Selain lembaga di atas, terdapat lembaga lain yang memiliki peranan penting yaitu Badan Pemeriksaan Keuangan Eropa dan Mahkamah Uni

47 Sekilas Uni Eropa, Sumber: https://eeas.europa.eu/sites/eeas/files/eu_at_a_glance_jan_2017_ed_id.pdf , diakses pada 11 September 2018 Pukul 13.47 WIB

Eropa.[48] Badan Pemeriksa Keuangan Eropa bertugas mengawasi anggaran Uni Eropa. Sedangkan, Mahkamah Uni Eropa bertugas untuk membantu memastikan bahwa negara – negara anggota Uni Eropa mematuhi undang – undang Uni Eropa yang telah mereka sepakati.

Mahkamah Uni Eropa atau yang dikenal dengan *European Court of Justice* (yang selanjutnya disebut dengan CJEU) memiliki tugas sebagai berikut[49]:

1. Menafsirkan hukum Uni Eropa untuk memastikan bahwa hukum tersebut dapat diterapkan dengan cara yang sama di semua negara Uni Eropa. Pengadilan nasional negara – negara Uni Eropa diharuskan untuk memastikan hukum Uni Eropa diterapkan dengan benar, tetapi pengadilan di berbagai negara mungkin menafsirkannya secara berbeda. Apabila pengadilan nasional ragu tentang intepretasi atau vaiditas hukum Uni Eropa, pengadilan nasional dapat meminta ke CJEU untuk memberikan klarifikasi. Mekanisme yang sama juga dapat digunakan untuk menentukan apakah hukum atau praktik nasional sesuai dengan hukum Uni Eropa.
2. Menegakkan hukum akibat adanya pelanggaran terhadap pemerintah nasional yang gagal mematuhi undang – undang Uni Eropa

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48 Sekilas Uni Eropa, Sumber: https://eeas.europa.eu/sites/eeas/files/eu_at_a_glance_jan_2017_ed_id.pdf , diakses pada 11 September 2018 Pukul 13.47 WIB

49 *European Union, Court of Justice of the European Union*, Sumber: https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en , diakses pada 11 September 2018 Pukul 14.42 WIB

3. Membatalkan tindakan hukum Uni Eropa. Jika tindakan Uni Eropa diyakini melanggar perjanjian Uni Eropa atau hak – hak fundamental, Pengadilan dapat diminta oleh pemerintah Uni Eropa, Dewan Uni Eropa, Komisi Eropa atau dalam beberapa kasus termasuk Parlemen Eropa untuk membatalkannya Indicivu perorangan juga dapat meminta Pengadilan untuk membatalkan tindakan Uni Eropa yang secara langsung terkait dengan mereka.
4. Memberikan sanksi kepada lembaga – lembaga Uni Eropa

CJEU terdiri dari dua jenis pengadilan yaitu *Court of Justice* dan *General Court*. Dalam proses pengadilan di *Court of Justice*, terdapat empat jenis tuntutan yang dapat dilakukan dan diproses oleh *Court of Justice*. Tuntutan tersebut terdiri dari[50]:

1. Permohonan untuk referensi putusan awal. *Court of Justice* bekerja sama dengan semua pengadilan di negara – negara anggota Uni Eropa, untuk memastikan bahwa penerapan undang – undang Uni Eropa dilaksanakan dengan efektif dan seragam serta untuk mencegah penafsiran yang berbeda. Pengadilan nasioal terkadang harus meminta *Court of Justice* untuk mengklarifikasi suatu poin mengenai intepretasi undang – undang Uni Eropa. Sehingga pengadilan nasional dapat memastikan apakah undang – undang nasional mereka mematuhi undang – undang Uni Eropa.

50 *Information Guide Court of Justice of the European Union*, Sumber: http://aei.pitt.edu/74891/1/Court_of_Justice.pdf , diakses pada 11 September 2018 Pukul 17.01 WIB

2. *Proceedings for failure to fulfil obligations*. Tuntutan yang ditujukan untuk menuntut lembaga Uni Eropa yang dinilai atau dianggap gagal dalam memenuhi kewajibannya.
3. *Proceedings for annulment*. Tuntutan yang diajukan oleh salah satu negara anggota, individu atau oleh sesama institusi Uni Eropa terhadap institusi pengambil keputusan Uni Eropa seperti Parlemen Eropa, Dewan Uni Eropa, Komisi Eropa dan Dewan Eropa. Tujuannya untuk membatalkan keputusan lembaga – lembaga Uni Eropa yang dinilai dan dianggap bertentangan dengan aturan Uni Eropa, dan/atau melampaui kewenangan lembaga tersebut.
4. *Proceedings for failure to act*. Tuntutan ini dapat diajukan oleh Lembaga Uni Eropa yang dalam prakteknya adalah Komisi Eropa, terhadap negara anggota yang gagal memenuhi peringatan resmi yang diajukan oleh Komisi Eropa.

Berbeda dengan *Court of Justice*, *General Court* memiliki yurisdiksi untuk mendengar dan menentukan kasus – kasus yang dibawa oleh orang – orang dalam tindakan langsung terhadap lembaga – lembaga Uni Eropa.[51]

*Court of Justice* terdiri dari 28 Hakim dan 11 Advokat Jenderal (*Advocates General*). Advokat Jenderal memiliki tugas utama untuk memberikan pendapat tentang kasus – kasus yang dibawa ke CJEU dan itu harus dilakukan secara terbuka dan tidak memihak. Pekerjaan yang paling

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51 *Court of Justice of The European Union*, ***Keyword*: *General Court***, Sumber: https://curia.europa.eu/jcms/jcms/Jo2_7033/en/ , diakses pada 11 September 2018 Pukul 15.37 WIB

penting yang dilakukan oleh Advokat Jenderal adalah memberikan opini tertulis bernama"*reasoned submission*".

Perlu diketahui bahwa Pengadilan yang meminta bantuan ke CJEU tidak berkewajiban untuk mengikuti opini yang disampaikan oleh Advokat Jenderal. Meskipun opini tersebut tidak mengikat pengadilan, tetapi hal ini berdampak pada banyak kasus, termasuk kasus Asma Bougnaoui di Perancis.

Pendapat Advokat Jenderal biasanya mempertimbangkan semua pandangan dan argument yang berbeda yang berpotensi berlaku untuk kasus tersebut, sementara penilaian CJEU tidak mendalam dan lebih disesuaikan dengan spesifik masalah hukum yang ada. Namun, tidak semua kasus membutuhkan pendapat dari Advokat Jenderal. Jika negara anggota adalah pihak dalam proses, maka Advokat Jenderal dari negara anggota tersebut tidak akan ditunjuk untuk memberikan pendapat dalam kasus ini demi menghindari tekanan politik apapun yang dapat membahayakan independensi dan ketidak berpihakannya.

Prosedur dalam *Court of Justice* dimulai dari tahapan tertulis, dan jika sesuai dilanjutkan pada tahap lisan yang bersifat publik dan berlaku untuk semua jenis kasus. Dalam permohonan referensi untuk putusan awal, pengadilan nasional harus mengajukan pertanyaan ke *Court of Justice* tentang penafsiran atau validitas ketentuan undang – undang Uni Eropa, umumnya dalam bentuk putusan pengadilan yang sesuai dengan aturan procedural nasional. Ketika permintaan itu diterjemahkan ke dalam semua bahasa Uni Eropa, *Register* atau panitera akan memberitahukannya

kepada pihak – pihak dalam proses nasional, dan juga kepada semua negara anggota Uni Eropa serta lembaga – lembaga Uni Eropa. Sebuah pemberitahuan diterbitkan dalam Jurnal resmi Uni Eropa yang mencantumkan nama – nama pihak dalam proses dan isi pertanyaan. Para pihak, negara – negara anggota dan lembaga – lemabga Uni Eropa memiliki waktu selama dua bulan untuk menyerahkan pengamatan tertulis kepada *Court of Justice*.

Sedangkan, dalam tindakan langsung dan banding, sebelum tindakan tersebut masuk ke pengadilan, harus membawa aplikasi yang ditujukan kepada Panitera. Kemudian, Panitera menerbitkan pemberitahuan tentang tindakan di Jurnal Resmi yang menetapkan klaim dan argument pemohon. Aplikasi ini disajikan pada pihak lain yang memiliki waktu dua bulan untuk mengajukan pembelaan atau tanggapan. Jika sesuai, pemohon dapat mengajukan balasan dan termohon mendapat balasan. Batas waktu yang sudah ditentukan untuk dokumen – dokumen ini harus dipatuhi.

Setelah prosedur tertulis ditutup, para pihak dapat menyatakan apakah dan mengapa mereka menginginkan sidang tersebut diadakan dalam waktu tiga minggu. Selanjutnya, pengadilan memutuskan setelah membaca proposal pelapor dan mendengarkan pandangan dari Advokat Jenderal.

Ketika diputuskan bahwa sidang akan dilaksanakan secara lisan, kasus tersebut akan diperdebatkan pada audiensi publik. Para Hakim dan Jaksa Agung dapat mengajukan pertanyaan yang dianggap pantas kepada

para pihak. Setelah beberapa minggu kemudian, Advokat Jenderal menyampaikan pendapatnya di depan Pengadilan secara terbuka. Advokat jenderal menganalisis secara rinci aspek hukum dari kasus yang ditangani dan menyarankan sepenuhnya secara independen *Court of Justice*, atas tanggapan yang dianggap harus diberikan untuk masalah yang diajukan. Hal ini menandai akhir dari proses tahap lisan. Jika diputuskan bahwa kasus tersebut tidak menimbulkan pertanyaan hukum baru, *Court of Justice* dapat memutuskan, setelah mendengar Advokat Jenderal memberikan penilaian tanpa pendapat. Di bawah ini merupakan diagram alur prosedur yang dapat diajukan ke CJEU, adapun alurnya sebagai berikut[52]:

**Tabel 4.2.1**

**Prosedur**

| | | |
|---|---|---|
| ***Procedure before the Court of Justice*** | | |
| *DÍrect actions and appeals* | | *References for a prelÍminary ruling* |
| ***Written procedure*** | | |
| *Application*<br>*Service of the application on the defendant by the Registry*<br>***Notice of the action in the Official Journal of*** | *[Application for legal aid]*<br>*Designation of Judge-Rapporteur and Advocate General* | *National court's decision to make a reference*<br>*Translation into theother official languages of the European Union*<br>***Notice of the questions referred for a preliminary ruling in the Official Journal of the EU*** *(C Series)* |

[52] *Court of Justice*, Sumber: https://curia.europa.eu/jcms/jcms/Jo2_7024/en/ , diakses pada 12 September 2018 Pukul 11.57 WIB

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|---|---|---|
| ***the EU*** *(C Series)*<br>*[InterÍm measures]*<br>*[Intervntion]*<br>*Defence/Response*<br>*[Objection to admissibility]*<br>*[Reply and Rejoinder]* | | *Notificaton to the parties to the proceedings, the Member States, the institutions of the European Union, the EEA States and the EFTA Surveillance Authority*<br>*Written observations of the parties, the States and the institutions* |
| *The Judge-Raporteur draws up the preliminary report*<br>*General meeting of the Judges and the Advocates General*<br>*Assignment of the case to a formation*<br>*[Measures of inquiry]* | | |
| ***Oral stage*** | | |
| *[**Opinion** of the Advocate General]*<br>*Deliberation by the Judges*<br>***Judgment*** | | |

Selain CJEU, Uni Eropa memiliki organ peradilan yang didirikan pada tahun 1959 yang bertugas mengawasi pelaksanaan *European Convention of Human Rights*. Organ peradilan itu disebut *Europen Court of Human Rights* (yang selanjutnya disebut ECtHR). ECtHR dibentuk untuk menghilangkan *European Commission of Human Rights*.

ECtHR memiliki yurisdiksi untuk memutuskan pengaduan yang diajukan oleh individu atau negara mengenai pelanggaran *European Convention of Human Rights* yang pada prinsipnya menyangkut hak – hak sipil dan politik. Namun, kasus yang diajukan ke ECtHR harus menyangkut pelanggaran *European Convention of Human Rights* yang diduga dilakukan oleh negara pihak pada konvensi tersebut serta yang

secara langsung dan signifikan mempengaruhi pemohon. Putusan yang dikeluarkan oleh ECtHR mengikat secara hukum, yang berarti bahwa mereka harus dihormati dan dilaksanakan oleh negara – negara anggota Uni Eropa. Adapun prosedur pelaporan kasus ke ECtHR sebagai berikut:

1. Pelapor harus mengunduh formulir aplikasi dari situs web pengadilan, kemudian isi dengan hati – hati dan dapat terbaca dengan jelas, lalu dibubuhi tanda tangan. Pengaduannya dalam bentuk tertulis bukan dalam bentuk lisan
2. Kemudian dikirim hanya melalui pos ke alamat yang sudah tercantum bersama dengan dokumen – dokumen yang relevan. Dokumen tersebut dapat ditulis dalam bahasa Inggris atau bahasa Perancis
3. Kasus tersebut kemudian diperiksa, hanya saja pemeriksaan tersebut dilakukan terhadap dokumen saja. Dokumen yang harus dilengkapi berupa ringkasan singkat tentang fakta dan keluhan pemohon, indikasi adanya pelanggaran hak – hak yang tercantum dalam ECHR, solusi yang sudah pernah ditempuh, baik secara hukum ataupun tidak, salinan putusan yang diberikan oleh pengadilan terkait, serta tanda tangan pemohon dan tanda tangan perwakilan jika ada
4. Jika tidak ingin mengungkapkan identitas harus segera diberi tahukan ke pengadilan, agar nantinya pengadilan yang memutuskan apakah permintaan tersebut dapat dikabulkan atau tidak

5. Prosesnya dilakukan secara tertulis dan akan diinformasikan kepada pemohon mengenai keputusan apa yang akan diambil oleh pengadilan
6. Pengadilan kemudian memeriksa apakah dokumen yang diterima sudah sesuai atau belum. Jika dokumen atau salah satu dari keluhan pemohon tidak dapat diterima, maka putusan tersebut adalah final dan tidak dapat dibatalkan. Jika dokumen atau salah satu keluhan pemohon diterima, maka pengadilan akan mendorong para pihak untuk menyelesaikan masalah tersebut secara damai.

Negara – negara anggota Uni Eropa, selain memiliki CJEU dan ECtHR, juga memiliki pengadilan nasionalnya sendiri. Salah satu negara anggota Uni Eropa tersebut adalah Perancis. Sistem hukum di Perancis mengikuti tradisi hukum perdata. Hukum Perancis secara tradisional dibagi menjadi dua cabang utama yaitu hukum publik dan hukum privat. Hukum publik mengatur pertanyaan yang melibatkan badan administrative dan hubungan mereka dengan individu – individu swasta. Sebaliknya, hukum swasta mencakup masalah – masalah komersiel dan sipil murni dan menyangkut semua hal yang tidak diatur oleh hukum public. Perbedaan hukum yang lainnya antara sektor swasta dan sektor publik, yang mana masing – masing diatur oleh peraturan, pengadilan dan prosedur penyelesaiannya sendiri.

Mengenai sengketa hukum swasta, sistem pengadilan Perancis memiliki struktur tiga tingkat. Tingkat pertama secara khusus dan

berkompeten menangani perselisihan perburuhan individual yang bernama *The Industrial Tribunal* (*The Labour Tribunal*) atau dalam bahasa Perancisnya disebut *Conseil de prud'hommes*.[53] Ruang lingkup pengadilan industrial ini yaitu sengketa atas pelatihan, kinerja atau pelanggaran kontrak kerja.[54] *Conseil de prud'hommes* juga menjamin perlindungan hak – hak dasar dan kebebasan individu, seperti prinsip non – diskriminasi, hak mogok, hak untuk menghormati privasi dan hak atas kebebasan berekspresi. Tetapi, Pengadilan industrial ini tidak berkompeten untuk mendengar sengketa yang dikaitkan dengan yurisdiksi lain oleh hukum, khususnya oleh *code de la sécurité sociale* (kode jaminan sosial) tentang kecelakaan di tempat kerja dan penyakit akibat kerja.[55]

*Conseil de prud'hommes* memiliki yurisdiksi dalam semua perselisihan perburuhan individual terlepas dari profesi karyawan atau jumlah yang dipermasalahkan. Klausul yurisdiksi apapun yang mengaku memberikan kekuasaan kepada hakim lain dianggap batal. Perselisihan perburuhan individu diartikan sebagai sengketa apapun terkait klasifikasi hukum, pembentukan, penerapan atau pengakhiran kontrak kerja.

Jika terjadi perselisihan semacam itu, hakim di *Conseil de prud'hommes* pertama – tama akan mencoba untuk merekonsiliasi para pihak. Para pihak tersebut harus membawa kasus mereka ke hadapan Dewan Konsiliasi dan Bimbingan (*Bureau de Conciliation et d'orientation*). Dewan ini berfungsi untuk mendamaikan para pihak, menginformasikan masing – masing pihak tentang hak mereka dan

53 *Article* L. 1411 – 1 – L. 1411 – 3 *Code du Travail*
54 *Article* L. 1411 – 1 – L. 1411 – 3 *Code du Travail*
55 *Article* L. 1411 – 4 *Code du Travail*

memastikan bahwa setiap rekonsiliasi menghormati hak kedua belah pihak. *Bureau de Conciliation et d'orientation* terdiri dari dua konselor yaitu pengusaha dan karyawan.[56] Para konselor ini diberikan pelatihan hukum untuk melaksanakan tugas mereka dalam melakukan konsiliasi. Jika konsiliasi gagal, kasus ini diputuskan oleh dewan persidangan yaitu *The Full Ttribunal*.

Pada tingkat kedua, terdapat pengadilan banding yang disebut *Cour d'appel*. *Cours d'appel* terbagi menjadi empat ruang yaitu *Chambre correctionelle*, *Chambre d'accusations*, *Chambre Sociale*, dan *Chambre civile*.[57] Dari keempat ruang tersebut yang dapat mendengar seruan dari kasus yang melibatkan pertanyaan keamanan sosial, kontrak kerja dan penerapan hukum kesejahteraan sosial adalah *Chambre sociale*.[58] Fungsi *Cour d'appel* yaitu memberikan banding dengan benar dari semua putusan pengadilan – pengadilan di tingkat pertama. *Cours d'appel* cenderung memutuskan kasus berdasarkan fakta bukan pada hukum.

Di tingkat terakhir terdapat pengadilan kasasi yang sering disebut *Cour de Cassation*. Pengadilan kasasi ini juga memiliki beberapa kamar – kamar yang sudah diatur, seperti[59]:

1. *Chambre civile, le section civile,* menangani kasus yang melibatkan pertanyaan kebangsaan, status pribadi, proper, kontrak non – komersial, hak gadai dan hipotek, suksesi,

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56 *Article* L. 1423 – 13 *Code du Travail*

57 Nina Nichols, 1975, ***The Structure and Role of Courts of Appeal in Civil Law Systems***, *Louisiana Law Review,* Vol. 35 No. 5, 1975, hlm. 1164 - 1165

58 Nina Nichols, 1975, ***The Structure and Role of Courts of Appeal in Civil Law Systems***, *Louisiana Law Review,* Vol. 35 No. 5, 1975, hlm. 1165

59 Nina Nichols, 1975, ***The Structure and Role of Courts of Appeal in Civil Law Systems***, *Louisiana Law Review,* Vol. 35 No. 5, 1975, hlm. 1166 - 1167

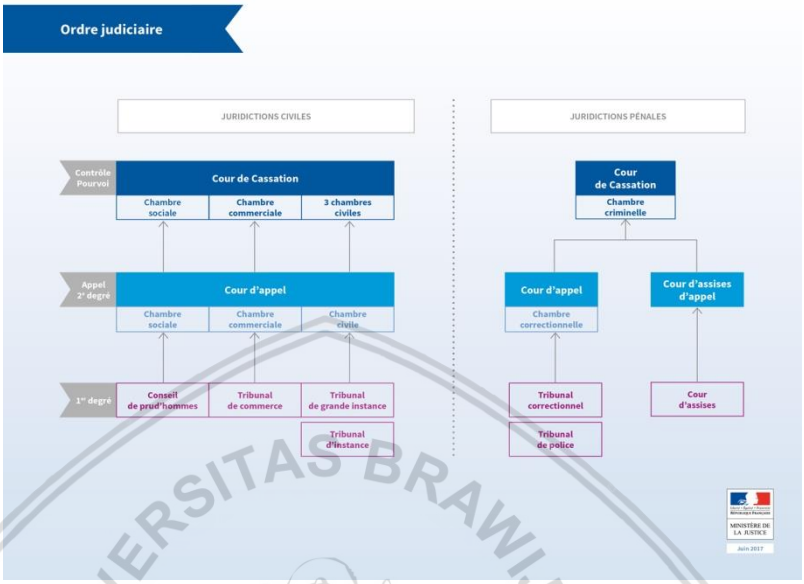
donasi, hak cipta, pemisahan kekuasaan, kerusakan perang dan proses disipliner terhadap pejabat perwira

2. *Chambre civile 2, le section civile*, mengulas gugatan, perceraian dan perpisahan, prosedur perdata, pemilihan umum dan beberapa kasus jaminan sosial
3. *Chambre civile, section socialle*, yang mengulas pertanyaan hukum perburuhan, sewa lahan, dan sebagian besar sengketa tentang jaminan sosial
4. *Chambre civile, section commercial et finance*, mengulas masalah komersial dan keuangan
5. *Chambre criminelle*, mengulas semua pertanyaan tentang hukum criminal.

*Cour de cassation* diberikan wewenang untuk memaksakan kewenangannya pada pengadilan lain sehingga bisa menjamin keseragaman hukum, yang dilihat sebagai satu fungsi utamanya. Fungsi utama lainnya yaitu mencoba untuk menjaga hukum tetap murni dengan memastikan bahwa pengadilan yang lebih rendah tidak berbeda dalam putusan mereka dari hukum yang tercantum dalam undang – undang negaranya.

**Gambar 4.2.1**

**Diagram Pengadilan di Perancis[60]**




Berdasarkan uraian di atas, pada dasarnya jenis pengadilan terbagi menjadi dua jenis yaitu *tribunal* dan *Court*. Adapun perbedaannya yaitu,

**Tabel 4.2.2**

**Perbedaan *Tribunal* dan *Court*[61]**

| **Dasar Untuk Perbandingan** | ***Tribunal*** | ***Court*** |
|---|---|---|
| **Definisi** | *Tribunal* merupakan penagdilan kecil yang mengadili sengketa yang timbul dalam | *Court* mengacu pada bagian dari sistem hukum yang ditetapkan untuk menjatuhkan |

60 Sumber : http://www.justice.gouv.fr/organisation-de-la-justice-10031/lordre-judiciaire-10033/

61 Sumber : https://keydifferences.com/difference-between-tribunal-and-court.html

| | | |
|---|---|---|
| | kasus – kasus khusus | putusan mereka pada kasus perdata dan pidana |
| **Putusan** | Putusannya disebut *awards* | Putusannya disebut *Judgement* |
| **Kasus yang ditangani** | Kasus – kasus khusus | Berbagai macam kasus |
| **Pihak** | *Tribunal* dapat menjadi pihak yang bersengketa | Hakim pengadilan tidak memihak dan bukan termasuk pihak |
| **Dipimpin oleh** | Ketua dan anggota peradilan lainnya | Hakim atau Panel Hakim |
| **Kode Prosedur** | Tidak ada prosedur semacam itu | Harus mengikuti kode prosedur secara ketat |

Dilihat dari artinya, *Tribunal* digambarkan sebagai pengadilan kecil, yang mengadili sengketa yang timbul dalam kasus – kasus khusus. Berbeda dengan *court* yang mana pengadilan ini mengacu pada bagian dari sistem hukum yang ditetapkan untuk memberikan keputusan pada kasus perdata dan pidana. Contoh dari pengadilan *tribunal* yaitu *The Industrial Tribunal* yang berada di Perancis yang bertugas mengadili kasus – kasus di bidang ketenagakerjaan.

Dalam kasus Bougnaoui, langkah pertama yang diambil yaitu membawa kasus tersebut ke *The Conseil de Prud'hommes de Paris* yang mana pengadilan tersebut memang berwenang untuk mengadili kasus yang berhubungan dengan ketenagakerjaan. Tidak puas dengan putusan pengadilan di tingkat pertama, dapat mengajukan banding ke *Chambre Sociale Cour d'appel* yang merupakan kamar di Pengadilan Banding bagian mengurusi ketenagakerjaan. Merasa putusan tersebut tidak sesuai, akhirnya mengajukan kasasi ke *Cour de cassation*. Pengadilan kasasi di sini memutuskan untuk merujuk kasus ini ke CJEU. Pengadilan Kasasi meminta CJEU untuk menafsirkan salah satu pasal yang tercantum dalam *Directive 2000/78/EC*. Permintaan tersebut dikabulkan oleh CJEU dengan adanya pendapat resmi yang disampaikan oleh advokat umum Sharpston.

Berdasarkan uaraian di atas, lembaga – lembaga peradilan yang ada di Uni Eropa, merupakan bentuk perwujudan dari perlindungan hukum yang diberikan oleh Uni Eropa kepada warga negara yang mengalami tindak diskriminasi di negara asalnya.

# BAB V

# PENUTUP

## A. Kesimpulan

Dari hasil penelitian dan pembahasan pada bab sebelumnya, dapat ditarik kesimpulan bahwa,

1. Legalitas terkait larangan penggunaan jilbab pada saat bekerja di perusahaan di Perancis termasuk dalam bentuk diskriminasi langsung, terutama pada saat melakukan kunjungan kerja ke kantor pelanggan. Hal ini dikarenakan, di Perancis belum ada aturan atau kebijakan yang melarang perusahaan swasta untuk melarang penggunaan jilbab pada saat bekerja. Bahkan penggunaan jilbab tidak bisa dijadikan sebagai persyaratan kerja terutama jika bertemu dengan pelanggan. Padahal seharusnya aturan internal perusahaan tidak boleh bertentangan dengan aturan nasional negara Perancis itu sendiri. Selain itu, aturan Perancis mengenai larangan penggunaan jilbab juga bertentangan dengan aturan hukum internasional dan aturan hukum Uni Eropa. Bahkan Uni Eropa pun tidak dapat melarang Perancis membuat aturan tersebut dikarenakan Perancis memiliki kedaulatan negaranya sendiri, hanya saja Uni Eropa dapat memberikan perlindungan hukum bagi warga negara yang tinggal di negara anggota Uni Eropa seperti Perancis.
2. Perlindungan hukum bagi pekerja perempuan muslim yang mengalami diskriminasi terkait larangan penggunaan jilbab pada

saat bekerja di Perancis, dapat dilakukan dengan cara membawa kasus tersebut ke pengadilan nasional yang secara khusus mengadili permasalahan ketenagakerjaan di Perancis. Selain pengadilan nasional, Uni Eropa juga memberikan perlindungan hukum dengan adanya dua lembaga peradilan yang dapat dirujuk oleh individu yang mengalami diskriminasi di negara asalnya.

## B. Saran

Berdasarkan kesimpulan yang sudah diuraikan di atas, maka saran yang dapat diajukan adalah sebagai berikut:

1. Jika negara Perancis ingin menerapkan aturan tersebut, harusnya dibuat terlebih dahulu dan diundangkan dalam perundang – undangan nasional negaranya, sehingga jika terjadi kasus seperti ini sudah memiliki landasan hukum.
2. Dalam proses pembuatan aturan internal perusahaan, setiap perusahaan harusnya memahami terlebih dahulu bagaimana aturan nasional yang berada di tempat perusahaannya itu berdiri.

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KEPUTUSAN DEKAN FAKULTAS HUKUM UNIVERSITAS BRAWIJAYA
NOMOR 370 Tahun 2018

TENTANG

PENUGASAN DOSEN SEBAGAI PEMBIMBING SKRIPSI MAHASISWA
PROGRAM STUDI SARJANA ILMU HUKUM FAKULTAS HUKUM UNIVERSITAS BRAWIJAYA

DEKAN FAKULTAS HUKUM UNIVERSITAS BRAWIJAYA

Menimbang : a. bahwa penulisan skripsi merupakan syarat yang wajib ditempuh oleh mahasiswa Program Studi Sarjana Ilmu Hukum;
b. bahwa demi kelancaran penulisan skripsi diperlukan dosen pembimbing;
c. bahwa berdasarkan pertimbangan sebagaimana dimaksud dalam huruf a dan b perlu menetapkan Keputusan Dekan tentang Penugasan Dosen sebagai Pembimbing Skripsi Mahasiswa Program Studi Sarjana Ilmu Hukum Fakultas Hukum Universitas Brawijaya;

Mengingat : 1. Undang-Undang Nomor 20 Tahun 2003 tentang Sistem Pendidikan Nasional (Lembaran Negara Republik Indonesia Tahun 2003 Nomor 78, Tambahan Lembaran Negara Republik Indonesia Nomor 4301);
2. Undang-Undang Nomor 12 Tahun 2012 tentang Pendidikan Tinggi (Lembaran Negara Republik Indonesia Tahun 2012 Nomor 158, Tambahan Lembaran Negara Republik Indonesia Nomor 5336);
3. Keputusan Mendiknas Nomor 232/U/2000 tentang Pedoman Pelaksanaan Penyusunan Kurikulum Pendidikan Tinggi dan Penilaian Hasil Belajar Mahasiswa;
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| Tanggal | Bimbingan yang diberikan oleh dosen | | KETERANGAN / CATATAN |
|---|---|---|---|
| | Pembimbing I | Pembimbing II | |
| 5 April 2018 | | - Revisi Bab 1<br>- Revisi Bab 2 | - Latar belakang diperbaiki, contoh kasus diperjelas<br>- Kajian Pustaka ditambah dengan sistem hukum eropa |
| 0 April 2018 | | | |
| 8 April 2018 | - Revisi Bab 1 dan Revisi Bab 2 | | - Banyak kalimat yang kurang jelas, Bab 2, dipersingkat kajian pustaka dan ditambah hak kebebasan beragam |
| 5 September 2018 | - Langut Bab 4 | | |
| September 2018 | | - Revisi Bab 4 | - RM 1, Dyelaskan lebih detail tentang aturan hukum<br>RM 2. Alur prosedur perlindungan huku dyabarkan |
| 0 September 2018 | - Langut Bab 5 | | |
| 5 September 2018 | ACC ~~Sempro~~ Kompre | - Langut Bab 5<br>ACC ~~Sem~~ Kompre | |

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# SURAT KETERANGAN DETEKSI PLAGIASI

Nomor: 826/Plagiasi/FH/2018

Dengan ini diterangkan bahwa Skripsi yang ditulis oleh:

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NIM : 145010100111025
Judul : LEGALITAS LARANGAN PENGGUNAAN JILBAB BAGI PEREMPUAN MUSLIM YANG BEKERJA DI PERANCIS BERDASARKAN PERSPEKTIF HUKUM INTERNASIONAL

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**Legality over Prohibition on wearing Hijab for Muslim Women working in France seen from the Perspective of International Law**
**(A case study on Asma Bougnaoui vs Micropole)**

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# Legality over Prohibition on wearing Hijab for Muslim Women working in France seen from the Perspective of International Law
## (A case study on Asma Bougnaoui vs Micropole)

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## ABSTRACT

Several European countries including France have prohibited women from wearing hijab at workplace. One of the cases of this situation was experienced by Asma Bougnaoui in France. Asma works in a company in France called Micropole as an IT consultant. Once Asma visited one of Micropole's clients and surely she was wearing hijab during her visit. Later this was followed by a complaint coming from the client reporting to Micropole that the hijab was annoying to the client. This was responded by an order given by Micropole to Asma to take off her hijab only when she had an appointment with a client. The rejection to take off the hijab brought Asma to expulsion. Asma decided to act further by bringing this case to court. This thesis is aimed to analyse the use of hijab for Muslim women working in France based on the perspective of international law and legal protection for female workers working in France according to both national and international law. The thesis was analysed with case and statute approaches. The analysis was also extended to the contrast in which the European Union is well known for its high appreciation toward human rights and its position strongly against discrimination.

Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 13 July 2016 [1]

**Case C-188/15**

**Asma Bougnaoui**
**Association de défense des droits de l'homme (ADDH)**
**v**
**Micropole SA**

**(Request for a preliminary ruling from the Cour de cassation (Court of Cassation, France))**

(Social policy — Equal treatment in employment and occupation — Directive 2000/78/EC — Discrimination based on religion or belief — Genuine and determining occupational requirement — Meaning — Direct and indirect discrimination — Wearing of the Islamic headscarf)

1. To what extent does the prohibition of discrimination based on religion or belief under EU law, and in particular under Directive 2000/78, [2] render unlawful the dismissal of an employee who is a practising Muslim on the ground that she refuses to comply with an instruction from her employer (a private-sector undertaking) that she is not to wear a veil or headscarf when in contact with the customers of the business? The Court is asked the question with reference to Article 4(1) of that directive. As I shall go on to explain, issues arising from the distinction laid down in Article 2(2)(a) and (b) between direct and indirect discrimination are also relevant in that context. [3]

## Legal framework

*Convention for the Protection of Fundamental Human Rights and Freedoms*

2. Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') [4] states:

'1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

1 — Original language: English.

2 — Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

3 — A request for a preliminary ruling based on similar (though not identical) facts has been referred to the Court by the Hof van Cassatie (Court of Cassation, Belgium) in Case C-157/15 *Achbita* (pending before the Court). The question referred by that court is different in that it essentially concerns the difference between direct and indirect discrimination for the purpose of Article 2(2)(a) and (2)(b) of Directive 2000/78. My colleague, Advocate General Kokott, delivered her Opinion in that case on 31 May 2016.

4 — Signed at Rome on 4 November 1950. All the Member States are signatories to the ECHR, but the European Union has not yet acceded as such; see Opinion 2/13, EU:C:2014:2454.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

3. According to Article 14 of the ECHR:

'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

4. Article 1 of Protocol No 12 to the ECHR is entitled 'General prohibition of discrimination'.[5] Paragraph 1 states:

'The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

*Treaty on European Union*

5. Article 3(3) TEU provides:

'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection …'

6. Article 4(2) TEU states:

'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

*The Charter of Fundamental Rights of the European Union*

7. Article 10 of the Charter of Fundamental Rights of the European Union ('the Charter')[6] is entitled 'Freedom of thought, conscience and religion'. Paragraph 1 reads as follows:

'Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.'

5 — The protocol was opened for signature on 4 November 2000. Of the EU Member States, it has to date been signed by Austria, Belgium, Croatia, Cyprus, the Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovakia, Slovenia and Spain. Only Croatia, Cyprus, Finland, Luxembourg, Malta, the Netherlands, Romania, Slovenia and Spain have so far ratified it.

6 — OJ 2010 C 83, p. 389.

8. Article 16 of the Charter, entitled 'Freedom to conduct a business' provides:

'The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.'

9. Article 21 of the Charter is entitled 'Non-discrimination'. Paragraph 1 states:

'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'

*Directive 2000/78*

10. The recitals of Directive 2000/78 state, in particular:

'(1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of [EU] law.

…

(9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.

…

(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the [European Union]. ….

…

(15) The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. …

…

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.

…'

11. Article 1 of the directive provides that its purpose is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'.

12. Article 2 of the directive is entitled 'Concept of discrimination'. It states, in particular:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, …

…

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.'

13. According to Article 3 of the directive, entitled 'Scope':

'1. Within the limits of the areas of competence conferred on the [European Union], this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

…

(c) employment and working conditions, including dismissals and pay;

…'

14. Article 4 of Directive 2000/78 is entitled 'Occupational requirements'. Paragraph 1 provides:

'Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.'

15. Article 4(2) deals with differences of treatment based on a person's religion or belief in the specific context of occupational activities within churches and 'other public or private organisations the ethos of which is based on religion or belief'.

16. Article 6 of Directive 2000/78 lays down certain derogations from the provisions of the directive as regards discrimination based on grounds of age.

17. Article 7(1) of the directive provides that, with a view to ensuring full equality in practice, the principle of equal treatment is not to prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.

*French law*

18. Article L. 1121-1 of the Code du travail (Labour Code) provides:

'No one may limit personal rights or individual or collective liberties by any restriction which is not justified by the nature of the task to be performed and proportionate to the aim sought.'

19. Under Article L. 1321-3 of the Labour Code, in the version in force at the material time:

'Workplace regulations shall not contain:

(1) Provisions contrary to primary or secondary law or to the requirements laid down by the collective agreements and understandings as to working practices applicable in the undertaking or establishment;

(2) Provisions imposing restrictions on personal rights and on individual and collective freedoms which are not justified by the nature of the task to be undertaken or proportionate to the aim that is sought to be achieved;

(3) Provisions discriminating against employees in their employment or at their work, having the same professional ability, by reason of their origin, their sex, their conduct, their sexual orientation, their age … their political opinions, their trade union or works council activities, their religious beliefs, their physical appearance, their surname or by reason of their state of health or disability.'

20. Article L. 1132-1 of the Labour Code states:

'No person may be excluded from a recruitment procedure or from access to work experience or a period of training at an undertaking, no employee may be disciplined, dismissed or be subject to discriminatory treatment, whether direct or indirect, … in particular as regards remuneration, … incentive or employee share schemes, training, reclassification, allocation, certification, classification, career promotion, transfer, or contract renewal by reason of his origin, his sex, his conduct, his sexual orientation, his age, … his political opinions, his trade union or works council activities, his religious beliefs, his physical appearance, his surname … or by reason of his state of health or disability.'

21. According to Article L. 1133-1 of the Labour Code:

'Article L. 1132-1 shall not preclude differences of treatment arising from a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.'

## Facts, procedure and the question referred

22. Ms Asma Bougnaoui was employed as a design engineer by Micropole SA, a company described in the order for reference as specialising in advice, engineering and specialised training for the development and integration of decision-making solutions. Prior to working for that company as an employee, she had completed a period of end-of-studies training there. Her contract of employment with Micropole started on 15 July 2008.

23. On 15 June 2009, she was called to an interview preliminary to possible dismissal and she was subsequently dismissed by letter of 22 June 2009. That letter ('the dismissal letter') stated:

'You underwent your end-of-studies training that started on 4 February 2008 and were then engaged by our company on 1 August 2008 [7] as a design engineer. As part of your duties, you took part in assignments on behalf of our clients.

We asked you to work for the client, Groupama, on 15 May, at their site in Toulouse. Following that work, the client told us that the wearing of a veil, which you in fact wear every day, had embarrassed a number of its employees. It also requested that there should be "no veil next time".

When you were taken on by our company, in your interviews with your Operational Manager, […], and the Recruitment Manager, […], the subject of wearing a veil had been addressed very clearly with you. We said to you that we entirely respect the principle of freedom of opinion and the religious beliefs of everyone, but that, since you would be in contact internally or externally with the company's clients, you would not be able to wear the veil in all circumstances. In the interests of the business and for its development we are constrained, vis-à-vis our clients, to require that discretion is used as regards the expression of the personal preferences of our employees.

At our interview on 17 June, [8] we reaffirmed that principle of necessary neutrality to you and we asked you to apply it as regards our clients. We asked you again whether you could accept those professional requirements by agreeing not to wear the veil, and you answered in the negative.

7 — It is unclear why the dismissal letter should have used this date, since there appears to be common accord between the parties that Ms Bougnaoui's employment with Micropole commenced on 15 July 2008. I do not attach any significance to the point, at least as far as the present Opinion is concerned.

8 — While the dismissal letter uses this date, the order for reference states that an interview took place on 15 June 2009. It may of course be that two interviews took place. Whatever the position, I do not consider that anything turns on the point as far as the question referred to the Court is concerned.

We consider that those facts justify, for the aforementioned reasons, the termination of your contract of employment. Inasmuch as your position makes it impossible for you to carry out your functions on behalf of the company, as we cannot contemplate, given your stance, your continuing to provide services on our clients' premises, you will not be able to work out your notice period. Since that failure to work during the notice period is attributable to you, you will not be remunerated for your notice period.

We regret this situation as your professional competence and your potential had led us to hope for a long-term collaboration.'

24. In November 2009, Ms Bougnaoui challenged the decision to dismiss her before the Conseil de prud'hommes (Labour Tribunal), Paris, claiming that it was a discriminatory act based on her religious beliefs. The Association de défense des droits de l'homme (Association for the protection of human rights; 'the ADDH') intervened voluntarily in those proceedings. By judgment of 4 May 2011, that tribunal held the dismissal to be well founded on the basis of a genuine and serious reason, ordered Micropole to pay Ms Bougnaoui the sum of EUR 8378.78 by way of compensation in respect of her period of notice and rejected her other claims on the merits.

25. On appeal by Ms Bougnaoui and cross-appeal by Micropole, the Cour d'appel de Paris (Court of Appeal, Paris) upheld the judgment of the Labour Tribunal by judgment of 18 April 2013.

26. Ms Bougnaoui has brought an appeal against that judgment before the referring court. Since that court is uncertain of the correct interpretation of EU law in the circumstances of the case, it has referred the following question to the Court of Justice under Article 267 TFEU:

'Must Article 4(1) of [Directive 2000/78] be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?'

27. Written observations have been submitted to the Court by Ms Bougnaoui and the ADDH, Micropole, the French and Swedish Governments and by the European Commission. At the hearing on 15 March 2016, the same parties – with the addition of the United Kingdom Government – presented oral argument.

## Preliminary remarks

### *Introduction*

28. Taken at its most general, the issue the Court is being asked to consider concerns the impact of anti-discrimination rules under EU law on the wearing of religious apparel. It is being asked to do so with particular regard to the wearing of that apparel in the context of a private-sector employment relationship, by a woman who is a practising member of the Islamic faith. Much has changed in recent decades in terms of social customs generally and the labour market in particular. While at one time people of different religions and ethnic backgrounds might have expected to live and work separately, that is no longer the case. Issues that, relatively recently, were seen as being of no, or at most minimal, importance have now been brought into sharp and sometimes uncomfortable focus. Seen from that perspective, the context may be perceived as a relatively 'modern' one and may, in certain circles, be viewed as emotive. It is also a context involving widely differing views and practices within the European Union.

29. It is often (perhaps, generally) the case that not all of a particular religion's compendium of religious practice is perceived by someone who adheres to that religion as absolutely 'core' to his or her own religious observance. Religious observance comes in varying forms and varying intensities. What a particular person treats as essential to his or her religious observance may also vary over time. That is because it is relatively usual for levels of personal belief, and hence of personal observance associated with that belief, to evolve as a person passes through life. Some become less observant over time; others, more so. Amongst those who do adhere to a particular faith, the level of religious observance may likewise fluctuate over the course of the religious year. An enhanced level of observance – which the practitioner may feel it appropriate to manifest in a variety of ways – may therefore be associated with particular points in the religious year,[9] whilst a 'lesser' observance may seem adequate to the same person at other times .[10]

30. The issues that arise in this Opinion do not relate to the Islamic faith or to members of the female sex alone. The wearing of religious apparel is not limited to one specific religion or to one specific gender. In some cases, there are what may be termed absolute rules, although these will not necessarily apply to all adherents of the faith in question or in all circumstances. In other cases, there may be one or more styles of apparel available to adherents, who may choose to wear them either permanently (at least when in public) or at times and/or places they consider appropriate. Thus, by way of example only, nuns in the Roman Catholic and Anglican faiths were traditionally required to wear a form of habit incorporating a headdress or veil. In some orders, that distinctive apparel may now be replaced by a small discreet cross pinned to ordinary civilian apparel. Similarly, the use of the kippah[11] by male adherents to the Jewish faith is well known. While there is considerable debate as to whether there is an obligation to cover the head at all times (rather than only when at prayer), many orthodox members of the faith will do so in practice.[12] Male adherents to the Sikh faith are, in general, required to wear a dastar (or turban) at all times and may not remove it in public.[13]

31. There may in addition be a variety of types of religious apparel available to adherents to a particular faith. Ms Bougnaoui appears to have worn what is termed a 'hijab', that is to say a type of scarf which covers the head and neck but leaves the face clear. Other apparel worn by Muslim women include the niqab, a full-face veil leaving an opening only for the eyes, the burqa, a full-body covering including a mesh over the face, and the 'chadar' or 'chador' or 'abaya', a black veil which covers the entire body from head to ankles while leaving the face clear.[14]

9 — See, for example, judgment of the European Court of Human Rights ('the Strasbourg Court') of 1 July 2014 in *S.A.S. v. France*, CE:ECHR:2014:0701JUD004383511, § 12.

10 — By way of illustration: it is well known that figures for church attendance are at their highest over the Christmas period (with high spots for Midnight Mass and/or the service on Christmas Day); and many Christians 'make an effort' for Lent, before the rejoicing of Easter. A similar phenomenon may be observed in Judaism. Thus, synagogues may resort to issuing tickets in order to manage attendance at services on Rosh Hashanah (the Jewish New Year) and Yom Kippur (the Day of Atonement) – at other times of the year, such a procedure is unnecessary as there is adequate space for everyone who wishes to attend.

11 — Known also variously as the kippa, kipoh, or yarmulke or, more colloquially, as the skull cap.

12 — See, Oxtoby, W.G., *A Concise Introduction to World Religions*, Oxford University Press, Oxford, 2007.

13 — See Cole, W.O., and Sambhi, P.S., *Sikhism and Christianity: A Comparative Study*, Macmillan, 1993. Male Sikh barristers in the United Kingdom have reconciled their religious obligation with the dress requirements of the profession (wig and gown for court) by replacing the normal black dastar with a distinctive white dastar.

14 — For further information, see : *Niqab, hijab, burqa: des voiles et beaucoup de confusions*, Le Monde, 11 June 2015, available on the internet at http://www.lemonde.fr/les-decodeurs/article/2015/06/11/niqab-hijab-burqa-des-voiles-et-beaucoup-de-confusions_4651970_4355770.html#U3778UWCg7HuTisY.99.

32. Lastly, as regards the type of head and body apparel that female adherents to the Islamic faith may elect to wear, I would observe that like nearly all other faiths, there are different schools of thought within the Islamic religion as to the precise rules to be observed by adherents. Not all of those schools impose any requirement in this regard. Some take the view that women are free not to wear any form of head or body apparel. Other schools of thought dictate that it be worn by women at all times when in public. Certain Muslim women will adopt an elective approach, choosing whether or not to wear religious apparel depending on the context. [15]

33. Nor are the issues limited exclusively to the wearing of religious apparel. The use of religious signs has also given rise to controversy and it is plain that these may vary in both size and purport. For example, the Strasbourg Court founded part of its reasoning in its judgment in the Eweida case on the fact that the cross worn by Ms Eweida was 'discreet'. [16] It appears that the cross in question was a very small one, attached to a necklace around the wearer's neck. It might therefore be perceived as relatively, although obviously not entirely, inconspicuous. Other adherents to the Christian faith may choose to wear considerably larger crosses, extending to several centimetres in length. Sometimes, however, it may not be reasonable to expect the person concerned to make a 'discreet' choice. Thus, it is difficult to conceive how a male Sikh could be discreet or inconspicuous in his observance of the requirement to wear a dastar. [17] He either wears the turban mandated by his religion or he does not.

*The Member States*

34. In its judgment in *Leyla Şahin v. Turkey*, the Strasbourg Court observed that 'it is not possible to discern throughout Europe a uniform conception of the significance of religion in society … and the meaning or impact of the public expression of a religious belief will differ according to time and context'. [18] There is nothing to suggest that the position has changed in the 10-odd years since that judgment was delivered.

35. As regards the spread of religious beliefs throughout the Member States, the reports of a survey requested by the European Commission in 2012 [19] record that the average percentage of those purporting to hold Christian beliefs throughout the European Union was 74%. But the figures for the different Member States varied widely. For Cyprus, the figure was 99%, closely followed by Romania at 98%, Greece at 97%, Malta at 96%, Portugal at 93% and Poland and Ireland at 92%. By contrast, the lowest percentages were recorded in Estonia at 45% and the Czech Republic at 34%. Of those recorded as adhering to the Islamic faith, the highest percentage was recorded for Bulgaria, at 11%, followed by Belgium at 5%. The figure for 16 Member States was 0%. Of those claiming to be atheist or agnostic, the highest level was to be found in the Czech Republic, with 20% and 39% respectively, whilst 41% of the Netherlands population consider themselves to be agnostic. For Cyprus and Romania, the figure was 0% in each case. With respect to perceived discrimination on grounds of

15 — See, for example, judgment of the Strasbourg Court of 1 July 2014 in *S.A.S. v. France*, CE:ECHR:2014:0701JUD004383511. § 12 of that judgment records that the applicant, a devout Muslim, wore the niqab in public and in private, but not systematically. She wished to be able to wear it when she chose to do so, depending in particular on her spiritual feelings. There were certain times (for example, during religious events such as Ramadan) when she believed that she ought to wear it in public in order to express her religious, personal and cultural faith. Her aim was not to annoy others but to feel at inner peace with herself.

16 — Judgment of 15 January 2013 in *Eweida and Others v. the United Kingdom*, CE:ECHR:2013:0115JUD004842010, § 94.

17 — See point 30 above.

18 — Judgment of 10 November 2005 in *Leyla Şahin v. Turkey*, CE:ECHR:2005:1110JUD004477498, § 109.

19 — See European Commission, Special Eurobarometer 393, *Report on Discrimination in the EU in 2012*, November 2012. The report does not extend to Croatia. I should add that the figures quoted require to be read with a degree of caution. They are not based on official statistics but on replies given in response to questions asked. They do not distinguish between practising and non-practising members of a particular religious faith nor do they necessarily distinguish between religious affiliation and ethnic affiliation. I include them in order to show that there is no such thing as a 'norm' within the Member States in this context.

religion or beliefs within the Member States, the report states that 51% of Europeans generally thought it to be rare or non-existent while 39% considered it widespread. Discrimination on those grounds was seen as most widespread in France (66%) and Belgium (60%), while the equivalent figures for the Czech Republic and Latvia were 10%.

36. The legislation and case-law of the Member States relating to the wearing of religious apparel in an employment context also displays a wide degree of variety. [20]

37. At one end of the spectrum, certain Member States have adopted legislation imposing blanket bans on the wearing of certain types of apparel in public generally. Thus, both France [21] and Belgium [22] have enacted laws prohibiting the wearing of apparel designed to conceal the face in public places. While those laws are not specifically targeted at the employment sector, their scope is so wide that they may inevitably restrict the ability of certain persons (including Muslim women who choose to wear the burqa or the niqab) to gain access to the employment market.

38. Also relevant in that context are the principles of *laïcité* and *neutralité*, [23] which are once again particularly relevant in France and Belgium. It is on the basis of those principles that employees in the French State sector are prohibited from wearing religious signs or apparel at the workplace. [24] Public servants in Belgium are also strictly required to observe the principle of neutrality. [25]

39. Other Member States allow their public servants greater freedom. Thus, in Germany, the Bundesverfassungsgericht (Federal Constitutional Court) recently held that a prohibition on wearing religious signs in the workplace based on the risk, in the abstract, of an impairment of State neutrality in the public education sector is contrary to the freedom of faith and that to give priority to Judaeo-Christian values amounts to unjustified direct discrimination. It is only where the external appearance of school teachers may create or contribute to a sufficiently specific risk of an impairment of State neutrality or peaceful coexistence within the school system that such a prohibition may be justified. [26] In yet other Member States, there are no restrictions in principle on the wearing of religious signs or apparel by public servants. That is the case in, for example, Denmark, the Netherlands and the United Kingdom. [27] I should add that in each of those Member States the law draws no formal distinction between the legal rules applying to employees in the public sector and those in the private sector.

40. Turning to private-sector employment, there are once again wide variations between the Member States. I emphasise that there seems to be a general absence of relevant restrictions in this area. Those that I refer to below accordingly represent more the exception than the rule.

20 — I should stress that the review which follows does not purport in any way to be exhaustive. In referring to some of the laws and decisions of the courts of the Member States, I seek merely to highlight certain aspects of the rules in this area which seem to me to be particularly relevant. Of necessity, such an exercise is incomplete.

21 — Loi no 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public (Law No 2010-1192 of 11 October 2010 prohibiting concealment of the face in public places).

22 — Loi du 1er juin 2011 visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage (Law of 1 June 2011 prohibiting the wearing of all apparel concealing the face either entirely or primarily). The ban applies to all places accessible to the public.

23 — These may be rather loosely translated into English as '(State) secularism' and '(State) neutrality'.

24 — See, as regards public-sector schools, loi nº 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics (Law No 2004-228 of 15 March 2004 concerning, as an application of the principle of State secularism, the wearing of symbols or apparel which show religious affiliation in public primary and secondary schools) and see, more generally, Conseil d'État (Council of State) avis, 3 May 2000, *Mlle Marteaux*, No 217017.

25 — See Arrêté royal du 14 Juin 2007 modifiant l'arrêté royal du 2 octobre 1937 portant statut des agents de l'État (Royal Decree of 14 June 2007 amending the Royal Decree of 2 October 1937 regarding the regulations applying to public servants), Article 8.

26 — See order of 27 January 2015, 1 BvR 471/10 and 1 BvR 1181/10.

27 — That does not mean that there may not be restrictions based, for example, on health and safety grounds.

41. In France, the Full Court (*assemblée plénière)* of the French Cour de cassation (Court of Cassation) was required, in a recent case involving a private-sector crèche in a deprived area of the Yvelines department, to consider an employer's dress code prohibiting employees from wearing religious signs as part of their apparel. The deputy director had contravened that code by refusing to remove her Islamic headscarf and was dismissed. The national court held, having regard in particular to Articles L. 1121-1 and L. 1321-3 of the Labour Code, that restrictions on employees' freedom to manifest their religious beliefs must be justified by the nature of the work undertaken and proportionate to the aim it is sought to achieve. For that reason, private undertakings may not set out general and imprecise restrictions on a fundamental freedom in their conditions of employment. However, restrictions which are sufficiently precise, justified by the nature of the work undertaken and proportionate to the aim it is sought to achieve may be lawful. In that regard, the court noted that the undertaking in question had only 18 employees and those employees were or might be in contact with young children and their parents. On that basis, it upheld the restriction, while noting at the same time that it did not follow from its judgment that the principle of State secularism, within the meaning of Article 1 of the Constitution, applied to employment in the private sector not involving the management of a public service. [28]

42. Whilst the principle of *laïcité* does not in general apply to employment relationships in the private sector in France, restrictions may be imposed on the wearing of religious apparel, first, for reasons of health, safety or hygiene in order to protect the individual. [29] Second, there may be a justification where the proper functioning of the business so requires. Thus (i) an employee cannot refuse to perform certain tasks clearly set down in his contract of employment and known at the outset of the relationship, [30] (ii) it is necessary to avoid an unacceptable imbalance between the employees' rights to exercise their religious freedom and the employer's business interests and as between employees generally in terms, for example, of leave granted for religious holidays [31] and (iii) customer relationships may serve as a basis for a restriction, but only where harm to the business can be established; a mere fear that that may be the case will not suffice. [32]

43. In Germany, an employee in the private sector may, in principle, be prohibited from wearing religious signs in the workplace, either under a collective agreement or by virtue of the employer's power of management. Nevertheless, this may be done only exceptionally. [33] By contrast, in the Netherlands, the College voor de Rechten van de Mens (Institute for Human Rights) has held that a rule or an instruction expressly prohibiting the wearing of a religious sign falls to be considered as direct discrimination. [34]

28 — Cour de cassation, assemblée plénière, 25 June 2014, arrêt No 13-28.845 ('*Baby Loup*').

29 — See deliberation of the Haute autorité de la lutte contre les discriminations et pour l'égalité (Equal Opportunities and Anti-Discrimination Commission) (HALDE) No 2009-117 of 6 April 2009, points 40 and 41.

30 — See, by way of example, Cour de cassation, chambre sociale, 12 July 2010, No 08-45.509, and Cour de cassation, chamber sociale, 24 March 1998, No 95-44.738.

31 — See deliberation of the HALDE, No 2007-301 of 13 November 2007.

32 — For example, a saleswoman who wore full-body religious apparel at her place of employment was held to be validly dismissed where she had not worn that apparel when she was recruited (see Cour d'appel de Saint-Denis-de-la-Réunion, 9 septembre 1997, No 97/703.306). But the sole fact that the employee is in contact with customers will not justify the imposition of a restriction on that employee's freedom to manifest his or her religion. Consequently, the dismissal of an employee who refused to remove her headscarf, which she had worn since the beginning of her employment and which had not caused any problems with the customers of the business with whom she was in contact, has been held to be unfair (see CA de Paris, 19 June 2003, No 03-30.212).

33 — Thus, the Bundesarbeitsgericht (Federal Labour Court) has ruled that the dismissal of a member of the sales staff of a department store on the basis of her refusal to remove her headscarf could not be justified on the grounds laid down in the Kündigungsschutzgesetz (Law on protection against unfair dismissal) on the basis that she was not prevented from carrying out her work as a salesperson and that her conduct was not harmful to her employer. See judgment of 10 October 2002, 2 AZR 472/01.

34 — Decision of the Institute for Human Rights of 18 December 2015. While the decisions of the Institute have no binding legal force, they are highly persuasive and are in most cases followed by the national courts.

44. In a number of other Member States, certain restrictions on the wearing of religious apparel and signs by private-sector employees have been accepted on the grounds of (i) health and safety [35] and (ii) the business interests of the employer. [36]

*The case-law of the Strasbourg Court*

45. The Strasbourg Court has ruled that freedom of thought, conscience and religion, as enshrined by Article 9 of the ECHR, represents one of the 'foundations of a democratic society' within the meaning of the ECHR [37] and that religious freedom implies, inter alia, freedom to manifest one's religion, alone and in private, or in community with others, and in public. [38] It has held there to be an interference with that right where the measure at issue consists in a prohibition on wearing an Islamic headscarf. [39]

46. Of primary importance in its case-law that is relevant to this Opinion are (i) the derogation to the general right to freedom of religion laid down in Article 9(2) of the ECHR and (ii) Article 14 of the ECHR, which prohibits discrimination on a number of grounds, including religion.

47. Much of that case-law has concerned the application of national rules concerning the wearing of Islamic apparel. In such cases, having established that there has been an interference with the general right laid down in Article 9(1), the Strasbourg Court will go on to consider whether the measure was 'necessary in a democratic society' for the purposes of Article 9(2). In so doing, it will determine whether the measures taken at national level were justified in principle, that is to say, whether the reasons adduced to justify them appear 'relevant and sufficient' and are proportionate to the legitimate aim pursued. In order to rule on the last point, it must weigh the protection of the rights and liberties of others against the applicant's alleged conduct. [40] Since, for the reasons I shall outline in point 81 below, I do not intend to explore measures adopted by the State in any detail in this Opinion, I shall record the Strasbourg Court's case-law in this area only briefly. It is, however, worth outlining some of the cases in which that court has found the test of what is 'proportionate to the legitimate aim pursued' to be satisfied.

48. Thus, the Strasbourg Court has held, inter alia:

— that a ban on wearing an Islamic headscarf while teaching imposed on a teacher of children 'of tender age' in the State education sector was justified in principle and proportionate to the stated aim of protecting the rights and freedoms of others, public order and public safety; it was accordingly 'necessary in a democratic society'; [41]

35 — These include Belgium, Denmark, the Netherlands and the United Kingdom.

36 — Thus: (i) in Belgium, by judgment of 15 January 2008 (*Journal des tribunaux du travail*, No 9/2008, p. 140), the Cour du travail de Bruxelles (Higher Labour Court, Brussels) held that an employer might invoke objective considerations concerning the commercial image of his business in order to dismiss a shop assistant who wore the headscarf; (ii) in Denmark, the Højesteret (Supreme Court) has held that an employer may impose a dress code designed to reflect the undertaking's commercial image and not permitting the wearing of a headscarf provided that the rules under it apply to the workforce as a whole (Ufr. 2005, 1265H); (iii) the Netherlands courts have upheld employers' claims based on the priority of the professional and representative image of the business when implementing a dress code (see the analysis of the Commissie Gelijke Behandeling (Board of Equal Treatment) concerning the rules relating to police uniforms and 'life-style neutrality' (CGB-Advies/2007/08)); and (iv) it would appear that in the United Kingdom an employer may impose a dress code on his employees provided that, should the rules under that code prejudice a particular employee by reason of his religion, the employer must justify them (see Vickers, L., 'Migration, Labour Law and Religious Discrimination', in *Migrants at Work: Immigration and Vulnerability in Labour Law*, Oxford University Press, Oxford, 2014, Chapter 17).

37 — See, for example, decisions of 15 February 2001 in *Dahlab v. Switzerland*, CE:ECHR:2001:0215DEC004239398, and 24 January 2006 in *Kurtulmuş v. Turkey*, CE:ECHR:2006:0124DEC006550001.

38 — Judgment of 10 November 2005 in *Leyla Şahin v. Turkey*, CE:ECHR:2005:1110JUD004477498, § 105.

39 — See, for example, decision of 15 February 2001 in *Dahlab v. Switzerland*, CE:ECHR:2001:0215DEC004239398.

40 — For an example of the application of that test, see, for example, decision of 15 February 2001 in *Dahlab v. Switzerland*, CE:ECHR:2001:0215DEC004239398.

41 — Decision of 15 February 2001 in *Dahlab v. Switzerland*, CE:ECHR:2001:0215DEC004239398.

— that similar principles applied to a ban on head coverings (in this case an Islamic headscarf) imposed on an associate university professor who was a public servant [42] and to a similar ban imposed on a teacher of religious affairs in a public-sector secondary school; [43]

— that a ban on wearing religious apparel (in this case an Islamic headscarf) imposed on a social worker employed in the psychiatric services unit of a public-sector hospital similarly did not contravene Article 9 of the ECHR . [44]

49. By the last of these judgments, the Strasbourg Court ruled for the first time in relation to a ban imposed on public-sector employees outwith the education field. It found in that context that there was a link between the neutrality of the public hospital service and the attitude of its servants, requiring that patients should not be in any doubt as to that impartiality. The Contracting State had not exceeded its margin of appreciation under Article 9(2) of the ECHR. [45]

50. In a different context, that court has held that the protection of the health and safety of nurses and patients in a public-sector hospital constituted a legitimate objective. Assessing the requirement for protection of that kind in a hospital ward was an area where the domestic authorities must be allowed a wide margin of appreciation. A restriction on the wearing of a (Christian) cross and chain that was 'both visible and accessible' imposed on a nurse working on a geriatric ward in a psychiatric hospital was not disproportionate and was accordingly necessary in a democratic society. [46]

51. By contrast, in the context of the blanket ban on the wearing in public places of apparel designed to conceal the face, imposed by French legislation, the Strasbourg Court held, when considering the question of necessity in relation to public safety within the meaning of, inter alia, Article 9 of the ECHR that such a ban could be regarded as proportionate as regards the legitimate aim of public safety only where there was a general threat to that aim. [47]

52. In the sphere of private-sector employment, there is currently only one judgment of the Strasbourg Court that is directly relevant in the context of the wearing of religious apparel, namely *Eweida and Others v. The United Kingdom*. [48] The question before that court in the case of Ms Eweida concerned the open wearing of a cross, described as 'discreet', in breach (at the time) of her conditions of employment, which sought to project a certain corporate image. The Strasbourg Court held that that restriction constituted an interference with her rights under Article 9(1) of the ECHR. [49] In determining whether the measure in question was justified in principle and proportionate, a fair balance has to be struck between the competing interests of the individual and of the community as a whole, subject in any event to the margin of appreciation enjoyed by the State. [50] The employer's wish

42 — Decision of 24 January 2006 in *Kurtulmuş v. Turkey*, CE:ECHR:2006:0124DEC006550001.

43 — Decision of 3 April 2007 in *Karaduman v. Turkey*, CE:ECHR:2007:0403DEC004129604.

44 — Judgment of 26 November 2015 in *Ebrahimian v. France*, CE:ECHR:2015:1126JUD006484611.

45 — §§ 63 and 67. It is worth pointing out, however, that that judgment did not go without criticism from within the Strasbourg Court itself. In her partly concurring and partly dissenting opinion, Judge O'Leary observed that the Court's earlier case-law essentially concerned issues that are intimately linked to the values which educational establishments are intended to teach and that there was only little discussion in the judgment in the present case of the considerable extension of the case-law into the wider field. As regards the margin of appreciation given to Contracting States in the context of a religious head covering, she stated that such a margin of appreciation goes hand in hand with European supervision in cases where the ECHR applies and cannot simply be sidestepped by invoking that margin of appreciation, however wide. In his dissenting opinion, Judge De Gaetano stated, in support of his view that there had been a violation of Article 9 of the ECHR, that the judgment rested on what he termed the 'false (and very dangerous) premiss … that the users of public services cannot be guaranteed an impartial service if the public official serving them manifests in the slightest way his or her religious affiliation …A principle of constitutional law or a constitutional "tradition" may easily end up being deified, thereby undermining every value underpinning the [ECHR]…'.

46 — Judgment of 15 January 2013 in *Eweida and Others v. The United Kingdom*, CE:ECHR:2013:0115JUD004842010, §§ 99 and 100.

47 — Judgment of 1 July 2014 in *S.A.S. v. France*, CE:ECHR:2014:0701JUD004383511, § 139. Since the French Government had failed to satisfy that test, it lost on that ground. However, the measure was upheld on the basis of the separate aim of 'living together' put forward by that Government.

48 — Judgment of 15 January 2013, CE:ECHR:2013:0115JUD004842010.

49 — § 91.

50 — § 84.

to project its corporate image was a legitimate one but it required to be balanced against Ms Eweida's desire to manifest her religious belief. Since her cross was discreet, it could not have detracted from her professional appearance. Her employer had previously authorised the wearing of other items of religious apparel such as turbans and hijabs by other members of its workforce and the company had subsequently amended its dress code to allow for the visible wearing of religious symbolic jewellery. There being no evidence of any real encroachment on the interests of others, the domestic authorities – in this case the national courts which had rejected Ms Eweida's applications – had failed to protect her right to manifest her religion, in breach of the positive obligation under Article 9 of the ECHR.[51]

53. As regards the function of Islamic apparel and the role it plays in the lives of the women wearing it, I would pause to note what appears to be a shift in the Strasbourg Court's approach as between its earlier case-law and its more recent judgments.[52] In *Dahlab v. Switzerland,*[53] for example, it observed that 'the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which … is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils'.[54]

54. By contrast, in its judgment in *S.A.S v. France,*[55] the Court rejected arguments put forward by the French Government regarding gender equality in the following terms:'119. … The Court takes the view, however, that a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in [the second paragraphs of Articles 8 and 9 of the ECHR], unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms …

120. … However essential it may be, respect for human dignity cannot legitimately justify a blanket ban on the wearing of the full-face veil in public places. The Court is aware that the apparel in question is perceived as strange by many of those who observe it. It would point out, however, that it is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy …'

55. The other area in respect of which I would note a change of emphasis involves the freedom available to employees to relinquish their post and, by implication, to find another job elsewhere. In an earlier decision of the European Commission of Human Rights, this was held to be 'the ultimate guarantee of [the employee's] right to freedom of religion'.[56] More recently, the Strasbourg Court itself has taken a different view, holding that 'given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate'.[57]

51 — § 94.

52 — I accept, of course, that the contexts are different, the earlier case-law concerning the education sector and the later case-law the public sphere.

53 — Decision of 15 February 2001, CE:ECHR:2001:0215DEC004239398.

54 — See also judgment of 10 November 2005 in *Leyla Şahin v. Turkey*, CE:ECHR:2005:1110JUD004477498, § 111.

55 — Judgment of 1 July 2014, CE:ECHR:2014:0701JUD004383511.

56 — See decision of 3 December 1996 in *Konttinen v. Finland*, CE:ECHR:1996:1203DEC002494994, approved in decision of 9 April 1997 in *Stedman v. The United Kingdom*, CE:ECHR:1997:0409DEC002910795, where the Commission noted that the applicant was 'free to resign'.

57 — Judgment of 15 January 2013 in *Eweida and Others v. The United Kingdom*, CE:ECHR:2013:0115JUD004842010, § 83.

56. As regards alleged violations of Article 14 of the ECHR, the Strasbourg Court has held that that provision has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the ECHR and its Protocols.[58] In *Eweida and Others v. The United Kingdom*,[59] it held as regards Ms Eweida that, since it had found there to be a breach of Article 9, there was no need to examine her complaint under Article 14 separately.[60] With respect to the second applicant in that case, it stated that the factors to be weighed in the balance when assessing the proportionality of the measure under Article 14 taken in conjunction with Article 9 would be similar and that there was thus no basis for finding a breach of the first-mentioned provision in view of the fact that there had been no finding of a contravention of Article 9.[61]

57. While the aim underlying Protocol No 12 to the ECHR is to provide enhanced protection in respect of discrimination, its relevance to date has been very limited. In particular, only nine Member States have ratified it to date[62] and there has been only minimal case-law of the Strasbourg Court concerning it.[63]

*The differences between a restrictions-based approach and one based on discrimination*

58. In its written observations, Micropole has emphasised what it perceives to be a fundamental contrast in this area of the law between the restriction of a right and the prohibition of discrimination. Their scope of application is different and the former is markedly more flexible than the latter. They should, it observes, be differentiated.

59. The point is an important one and merits closer examination.

60. It is indeed true that the primary approach of the Strasbourg Court in applying the ECHR has been to adopt what I might call the restrictions-based approach by reference to Article 9. As I mentioned in point 56 above, the role played by Article 14 has been an ancillary one. Since the Charter has binding effect in EU law following the entry into force of the Treaty of Lisbon, it might be anticipated that this Court would now adopt the same approach in applying the equivalent provisions under that document, that is to say, Articles 10 and 21.

61. That view seems to me too simplistic.

62. Directive 2000/78 imposes a series of prohibitions based on discrimination. In so doing, it follows the approach adopted in what is now EU law since its inception.[64] In the context of age discrimination, the Court has held that the principle of non-discrimination must be regarded as a general principle of EU law which has been given specific expression in the Directive in the domain of employment and occupation.[65] The same must apply as regards the principle of non-discrimination on grounds of religion or belief.

58 — Judgment of 15 January 2013 in *Eweida and Others v. The United Kingdom*, CE:ECHR:2013:0115JUD004842010, § 85. For that reason, Article 14 of the ECHR has been described by some authors as being 'parasitic'. See Haverkort-Spekenbrink, S., *European Non-discrimination Law*, School of Human Rights Research Series, Volume 59, p. 127.

59 — Judgment of 15 January 2013, CE:ECHR:2013:0115JUD004842010.

60 — § 95.

61 — § 101.

62 — See footnote 5 above.

63 — See, by way of example, judgments of 22 December 2009 in *Sejdić and Finci v. Bosnia and Herzegovina*, CE:ECHR:2009:1222JUD002799606, and 15 July 2014 in *Zornić v. Bosnia and Herzegovina*, CE:ECHR:2014:0715JUD000368106. The cases concerned the right of the applicants to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina.

64 — See, further, point 68 et seq. below.

65 — See judgment of 13 September 2011 in *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 38.

63. At the same time, however, there is a fundamental difference in the intellectual analysis underlying the two approaches. It is true that the position may be essentially the same in the context of indirect discrimination, inasmuch as the derogations permitted under EU legislation require there to be a legitimate aim that is proportionate, thereby mirroring the position under the ECHR. But in the context of direct discrimination, the protection given by EU law is stronger. Here, interference with a right granted under the ECHR may still always be justified on the ground that it pursues a legitimate aim and is proportionate. In contrast, under the EU legislation, however, derogations are permitted only in so far as the measure in question specifically provides for them. [66]

64. That difference in approach seems to me to be a wholly legitimate one: Article 52(3) of the Charter specifically provides that EU law may provide more extensive protection than that given by the ECHR.

65. I would observe in passing that it is clear that the rules governing indirect discrimination may be noticeably more flexible than those relating to direct discrimination. It might be objected that the application of the rules laid down by EU law to the latter category is unnecessarily rigid and that some 'blending' of the two categories would be appropriate.

66. I do not believe this to be the case.

67. The distinction between the two classes of discrimination is a fundamental element of this area of EU legislation. There is in my view no reason to depart from it, with the inevitable loss of legal certainty that would result. Because the distinction is clear, the employer is forced to think carefully about the precise rules he wishes to lay down in his workplace regulations. In so doing, he needs to give proper consideration to the boundaries he wishes to draw and their application to his workforce.

*The prohibition of discrimination in EU law*

68. When the Treaty of Rome was originally adopted, the only provision under its Title on Social Policy having substance was Article 119, laying down an express requirement on the Member States to ensure equal pay without discrimination based on sex. The remaining provisions in that title were limited in scope and conferred little by way of direct rights on citizens. Matters have moved on considerably in the European Union since then.

69. At the early stage, protection developed most noticeably in relation to employment, with the adoption of Directive 75/117 on the application of the principle of equal pay for men and women, [67] followed by Directive 76/207 on equal treatment for men and women in employment matters [68] and the Court's landmark judgment in *Defrenne (No 2)*. [69] As a result, there was a prohibition of discrimination on grounds of sex within the scope of the relevant legislation, coupled (by virtue of the Court's judgment) with a distinction between direct and indirect discrimination.

70. The adoption of Article 13 EC (now, after amendment, Article 19 TFEU) following the entry into force of the Treaty of Amsterdam on 1 May 1999 provided enhanced powers to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. That Treaty provision formed the basis of Directive 2000/43 on discrimination on the

66 — See further, on Directive 2000/78, point 70 below.

67 — Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19).

68 — Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

69 — Judgment of 8 April 1976 in *Defrenne*, 43/75, EU:C:1976:56. For a fuller analysis, see Barnard, C., *EU Employment Law*, Oxford University Press, Oxford, 2012, chapter 1.

grounds of racial or ethnic origin[70] and of Directive 2000/78.[71] Each of those directives adopts the same structure: there is a blanket prohibition of direct discrimination, subject only to the specific derogations laid down in the legislation, coupled with a prohibition of indirect discrimination, which may however be justified where the measure in question is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.[72]

71. In his Opinion in *Coleman*,[73] Advocate General Poiares Maduro noted that equality is one of the fundamental principles of EU law. In his view, the values underlying equality are those of human dignity and personal autonomy. In order for the requirement of human dignity to be satisfied, there must, as a minimum, be a recognition of the equal worth of every individual. Personal autonomy, for its part, dictates that (to use his words) 'individuals should be able to design and conduct the course of their lives through a succession of choices among different valuable options'. Characteristics such as religious belief, age, disability and sexual orientation should have no role to play in any assessment as to whether it is right to treat someone less favourably.[74] He went on to say:'11. Similarly, a commitment to autonomy means that people must not be deprived of valuable options in areas of fundamental importance for their lives by reference to suspect classifications. Access to employment and professional development are of fundamental significance for every individual, not merely as a means of earning one's living but also as an important way of self-fulfilment and realisation of one's potential. The discriminator who discriminates against an individual belonging to a suspect classification unjustly deprives her of valuable options. As a consequence, that person's ability to lead an autonomous life is seriously compromised since an important aspect of her life is shaped not by her own choices but by the prejudice of someone else. By treating people belonging to these groups less well because of their characteristic, the discriminator prevents them from exercising their autonomy. At this point, it is fair and reasonable for anti-discrimination law to intervene. In essence, by valuing equality and committing ourselves to realising equality through the law, we aim at sustaining for every person the conditions for an autonomous life.'

72. I agree entirely with those observations. They emphasise that discrimination has both a financial impact (because it may touch on a person's ability to earn a living in the employment market) and a moral impact (because it may affect that person's autonomy). I would add that anti-discrimination legislation must, in the same way as all other legislation, be applied in a way that is effective. It must also be applied in accordance with established principles.

*Proselytising and behaviour at work*

73. When the employer concludes a contract of employment with an employee, he does not buy that person's soul. He does, however, buy his time. For that reason, I draw a sharp distinction between the freedom to manifest one's religion – whose scope and possible limitation in the employment context are at the heart of the proceedings before the national court – and proselytising on behalf of one's religion. Reconciling the former freedom with the employer's right to conduct his business will, as I

70 — Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22).

71 — It should be noted that the scope of protection of the two directives differs. For example, Article 3 of Directive 2000/43 provides that its scope extends to '(e) social protection, including social security and healthcare; (f) social advantages; (g) education; [and] (h) access to and supply of goods and services which are available to the public, including housing'. These grounds are not listed in Directive 2000/78. It will also be apparent that a measure amounting to discrimination on grounds of religion or belief may also, depending on the circumstances, represent discrimination on grounds of sex or race. While the Commission has adopted a Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008) 426 final), that proposal, which would expand the scope of protection in respect of the matters covered by Directive 2000/78, has yet to be taken forward.

72 — The same approach is adopted in the current legislation concerning sex discrimination, namely Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23).

73 — C-303/06, EU:C:2008:61.

74 — Points 8 to 10.

shall demonstrate, require a delicate balancing act between two competing rights. The latter practice has, in my view, simply no place in the work context. It is therefore legitimate for the employer to impose and enforce rules that prohibit proselytising, both to ensure that the work time he has paid for is used for the purposes of his business and to create harmonious working conditions for his workforce.[75] I should make it clear that I regard the wearing of distinctive apparel as part of one's religious observance as falling squarely within the first category, and not the second.

74. I likewise draw a clear distinction between rules legitimately promulgated by an undertaking that specify certain forms of conduct that are desired ('at all times, behave courteously to clients') or that are not permitted ('when representing our company in meetings with clients, do not smoke, chew gum or drink alcohol'); and rules that intrude on the personal rights of a particular category of employees on the basis of a prohibited characteristic (whether that be religion or another of the characteristics identified by the legislature as an impermissible basis for discrimination). The pernicious nature of the argument, 'because our employee X is wearing an Islamic headscarf' (or a kippah, or a dastar) (or is black, homosexual or a woman) 'it follows that (s)he cannot be behaving appropriately towards our clients' should require no further elaboration.

*Gender equality*

75. Some perceive wearing the headscarf as a feminist statement, as it represents a woman's right to assert her choice and her religious freedom to be a Muslim who wishes to manifest her faith in that way. Others see the headscarf as a symbol of oppression of women. Either view may no doubt find support in individual cases and particular contexts.[76] What the Court should not do, in my view, is to adopt the view that, because there may be some occasions where the wearing of the headscarf should or could be deemed oppressive, that is so in every instance. Rather, I would adopt the attitude of the Strasbourg Court cited in point 54 above; the matter is best understood as an expression of cultural and religious freedom.

**Assessment**

*The scope of the question referred*

76. By its question, the referring court seeks guidance as to the application of Article 4(1) of Directive 2000/78 to a wish (ultimately, it would appear, leading to the employee's dismissal) expressed by a customer to an employer no longer to have the employer's services provided by an employee wearing an Islamic headscarf. It asks whether that wish may constitute a 'genuine and determining occupational requirement' within the meaning of that provision, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out.

77. A number of issues arise from the wording of that question and the background to the dispute in the main proceedings.

75 — A measure prohibiting proselytising, whilst it might involve direct discrimination, would therefore, in my view, potentially be covered by the derogation in Article 2(5) of the directive as being necessary to protect the rights and freedoms of others. It would, however, require to be founded in 'measures laid down by national law': see the express text of the derogation.

76 — Thus, the particular context of the present case is that of an educated woman seeking to participate in the labour market of an EU Member State. Against that background, it would be patronising to assume that her wearing of the hijab merely serves to perpetuate existing inequalities and role perceptions. The reader will readily call to mind other possible, different contexts in which the question of women wearing Islamic apparel might arise and where it might be more legitimate to draw such an inference.

78. First, while the referring court uses the word 'headscarf' (*foulard*) in its question to this Court, elsewhere in the order for reference it talks of a 'veil' (*voile*).[77] In response to questions put by the Court at the hearing, it became clear that the two terms should be understood as synonyms. The apparel in question consisted of a head covering which left the face entirely clear. I shall use the term 'headscarf' below for the sake of consistency and clarity.

79. Second, whilst Article 3(1) of Directive 2000/78 makes it clear that the scope of the directive extends to both the public and private sectors, it is beyond doubt that there can be differences, in some cases substantial ones, as regards the ambit of national rules relating to those sectors.[78] Both in its written observations and oral submissions, the French Government has placed great emphasis on the rigid separation that exists in the public sector of that Member State as a result of the application of the principle of *laïcité*. The present case involving, as it does, a private-sector employment relationship, it suggests that the Court should restrict its answer to that area alone. It should not, in other words, address issues relating to the public-sector workforce.

80. Although the French Government did accept at the hearing that the scope of Directive 2000/78 extended to the public sector, it remained adamant as to the overriding nature of the rules on *laïcité* in that area, a point of view which in its written observations it based primarily on Article 3(1) of the directive, read in the light of Article 4(2) TEU.

81. I accept that complex arguments may arise as to the precise interrelationship between the directive and national provisions, including provisions of constitutional law, in this context. In saying that, I wish to make it clear that I neither accept nor do I reject the French Government's position as regards the applicability of the principle of *laïcité* to employment in the public sector in the context of Directive 2000/78. The other parties submitting observations to the Court in this case have not addressed that issue and there has thus been no detailed discussion of the questions which would or might arise. I shall therefore restrict my observations below to the private sector only.

82. Third, the order for reference provides only limited information regarding the factual background to the case in the main proceedings. It is thus difficult to ascertain with certainty the precise context in which the question put by the referring court was raised. I shall return to this point below.[79]

*Was there unlawful discrimination in the case in the main proceedings?*

83. The starting point for any analysis of the question whether there was unlawful discrimination in the case in the main proceedings must be the dismissal letter. However, it is not clear from that letter precisely what the terms of the prohibition applying to Ms Bougnaoui were. Asked to comment on that point at the hearing, Ms Bougnaoui's position was that it applied to the wearing of the Islamic headscarf when in contact with customers of the employer's business. Micropole said that there was a general ban on the wearing of religious signs (including, one has to assume, apparel) when attending the premises of those customers. That ban applied to all religions and beliefs.

84. Whatever the true position, it appears plain, nonetheless, that Ms Bougnaoui's dismissal was linked to a provision in her employer's dress code that imposed a prohibition based on the wearing of religious apparel.

77 — It may be thought that the word 'veil' always connotes an item of apparel that covers the face. That is not so; see, for example, the definition in the *Shorter Oxford English Dictionary*, which refers to fabric worn 'over the head *or* face' (emphasis added).

78 — See in particular, in that regard, point 38 above.

79 — See point 109 below.

85. However, it may also be observed that that dismissal was not in fact implemented on the ground of her religion (that is to say, the fact that she was a member of the Islamic faith) but on her manifestation of that religion (that is to say, the fact that she wore a headscarf). Does the prohibition laid down by Directive 2000/78 extend not only to the religion or belief of an employee but also to manifestations of that religion or belief?

86. In my view, it does.

87. It is true that the directive makes no express reference to the question of manifestation. However, a perusal of Article 9 of the ECHR and Article 10 of the Charter shows that, in each case, the right to manifest one's religion or belief is to be understood as an intrinsic part of the freedom they enshrine. Thus, each of those provisions, having set out the right to freedom of religion, goes on to state that that freedom 'includes' the right to manifest it. I therefore draw nothing from the fact that the directive is silent on the point.[80] To give only one example: were the position to be otherwise, a Sikh male, who is required by his religion to wear a turban, would have the benefit of no rights as regards his particular manifestation of his beliefs and thus risk being deprived of the very protection the directive seeks to provide.

88. On that basis, it seems impossible to conclude otherwise than that Ms Bougnaoui was treated less favourably on the ground of her religion than another would have been treated in a comparable situation. A design engineer working with Micropole who had not chosen to manifest his or her religious belief by wearing particular apparel would not have been dismissed.[81] Ms Bougnaoui's dismissal therefore amounted to direct discrimination against her on the basis of her religion or belief for the purposes of Article 2(2)(a) of Directive 2000/78.

89. That being so, the dismissal would have been lawful only if one of the derogations laid down in that directive were to have applied. Since the national court has worded its question by reference to Article 4(1), I shall start by considering that provision.

*Article 4(1) of Directive 2000/78*

90. Article 4 is entitled 'Occupational requirements'. Where the conditions of paragraph 1 are satisfied, a difference of treatment that would otherwise amount to discrimination is removed from the scope of the directive. That is the case whether the discrimination the difference of treatment gives rise to is direct or indirect. I now turn to those conditions.

91. First, Article 4 does not apply automatically. A Member State must first have 'provided' for it to do so.[82] The referring court refers to Article L. 1133-1 of the Labour Code in its order for reference without specifically stating that that is the provision of national law that is intended to give effect to Article 4(1). I assume, though, that that is the case.

80 — See also in that regard and in a different context, Opinion of Advocate General Bot in Joined Cases *Y and Z*, C-71/11 and C-99/11, EU:C:2012:224, where he observed that to require a person to conceal, amend or forego the public demonstration of his faith would be to deprive him of a fundamental right guaranteed to him by Article 10 of the Charter (points 100 and 101).

81 — I explored the distinction that falls to be made between direct and indirect discrimination in my Opinion in *Bressol and Others*, C-73/08, EU:C:2009:396, points 55 and 56. Here, it is precisely the prohibition on wearing apparel that manifests the employee's religious affiliation that leads to the adverse treatment, namely her dismissal.

82 — See judgment of 13 September 2011 in *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 46, which makes it clear that the Lufthansa collective agreement providing for the automatic termination of contracts of employment at a specified age had its origins and legitimacy in Article 14(1) of the Gesetz über Teilzeitarbeit und befristete Arbeitsverträge (Law on part-time employment and fixed-term employment contracts). It was therefore a measure 'falling within national law' (see paragraph 59 of the judgment).

92. Second, Member States may provide that a difference of treatment does not constitute discrimination only where that difference in treatment is 'based on a characteristic' related to any of the grounds referred to in Article 1. The Court has stated that 'it is not the ground on which the difference of treatment is based but a characteristic related to that ground which must constitute a "genuine and determining occupational requirement"'. [83]

93. In the present case, the letter terminating Ms Bougnaoui's employment states that she was dismissed because of her alleged failure or refusal to comply with the rules laid down by her employer as regards the wearing of a religious head covering when in contact with customers. Given that the wearing of the Islamic headscarf is (or at least should be accepted as being) a manifestation of religious belief, [84] a rule which prohibits the wearing of such a head covering is plainly capable of constituting a 'characteristic related to' religion or belief. That requirement too should be considered as satisfied.

94. Third, the characteristic in question must constitute a 'genuine and determining occupational requirement' by reason of the nature of the particular occupational activities concerned or the context in which they are carried out. Furthermore, the objective must be legitimate and the requirement must be proportionate.

95. The Court has held that Article 4(1) must be interpreted strictly. [85] Indeed, given the statement in recital 23 of the directive that the derogation should apply only 'in very limited circumstances', it is hard in the extreme to see that the position could be otherwise. It follows that Article 4(1) of Directive 2000/78 must be applied in a way that is specific. [86] It cannot be used to justify a blanket exception for all the activities that a given employee may potentially engage in.

96. The narrowness of the derogation is reflected in the wording of Article 4(1). Not only must the occupational requirement be 'genuine', it must also be 'determining'. That means, as the Swedish Government in my view rightly observes, that the derogation must be limited to matters which are absolutely necessary in order to undertake the professional activity in question.

97. Applying the provision in the context of age discrimination, the Court has accepted that a requirement based on age as to the possession of especially high physical characteristics may meet that test when applied to persons in the fire service whose activities are characterised by their physical nature and include fighting fires and rescuing persons. [87] It has also held that requirement to be satisfied in the case of an age-related condition for the retirement of airline pilots, on the basis that it is undeniable that physical capabilities diminish with age and that physical defects in that profession may have significant consequences. [88] Similarly, it has accepted that the possession of particular

83 — Judgment of 12 January 2010 in *Wolf*, C-229/08, EU:C:2010:3, paragraph 35.

84 — See in that regard point 75 above.

85 — See judgments of 13 September 2011 in *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 72, and 13 November 2014 in *Vital Pérez*, C-416/13, EU:C:2014:2371, paragraph 47. Article 4(1) may, perhaps, apply more often to direct rather than indirect discrimination (an obvious example, relating to sex discrimination, would be a 'women only' rule for membership of an all-female professional sports team). However, it is not inconceivable that such discrimination might be indirect. For example, a rule that applicants for a job as a security guard must be over 1m75 in height, although ostensibly neutral, would tend to exclude more women than men and might also affect a relatively larger proportion of some ethnic groups than others.

86 — Interestingly, the key wording in Article 4(1) of Directive 2000/78 differs as between the different language versions. The English-language version uses the expression 'by reason of the particular occupational activities concerned', which is essentially followed in the German ('aufgrund der Art einer bestimmten beruflichen Tätigkeit'), Dutch ('vanwege de aard van de betrokken specifieke beroepsactiviteiten') and Portuguese ('em virtude da natureza da actividade profissional em causa') versions. The French ('en raison de la nature d'une activité professionnelle'), Italian ('per la natura di un'attività lavorativa') and Spanish ('debido a la naturaleza de la actividad profesional concreta de que se trate') language versions adopt an approach which puts less stress on the specific nature of the activities concerned. Nevertheless, it seems clear that the emphasis must be placed on the particular activities which the employee is required to undertake.

87 — See judgment of 12 January 2010 in *Wolf*, C-229/08, EU:C:2010:3, paragraph 40.

88 — See judgment of 13 September 2011 in *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 67.

physical capabilities may satisfy the test in the context of an age-based requirement for admission to posts as a police officer, on the ground that tasks relating to the protection of persons and property, the arrest and custody of offenders and the conduct of crime prevention patrols may require the use of physical force.[89]

98. The Court has had occasion to look at an analogous derogation from the principle of equal treatment on grounds of sex contained in Article 2(1) of Directive 76/207[90] in the context of direct discrimination on grounds of sex and service in the armed forces. The different conclusions as to the applicability of the derogation in Article 2(2) of that directive[91] reached in *Sirdar*[92] and (less than three months later) in *Kreil*[93] confirm the importance of subjecting to close scrutiny the argument that a particular characteristic is essential for the performance of a particular job. They also show that one must look at both the activity and the context (rather than one or the other in isolation) in order to determine whether a particular characteristic is really and truly essential (or, to use the wording of Directive 2000/78, a 'genuine and determining occupational requirement').

99. As regards the prohibition concerning discrimination on the ground of religion or belief, the obvious application of the derogation would be in the area of health and safety at work. Thus, for example, it would be possible to exclude, for those reasons, a male Sikh employee who insisted for religious reasons on wearing a turban from working in a post which required the wearing of protective headgear. The same could apply to a female Muslim working on potentially dangerous factory machinery and whose wearing of particular attire could give rise to serious concerns on safety grounds. Whilst I do not wish to state that there are no other circumstances in which the prohibition of discrimination based on religion or belief could fall within Article 4(1), I find it hard to envisage what they could be.

100. But I cannot see any basis on which the grounds which Micropole appears to advance in the dismissal letter for dismissing Ms Bougnaoui, that is to say, the commercial interest of its business in its relations with its customers, could justify the application of the Article 4(1) derogation. As the Commission rightly observes, first, the Court has held that direct discrimination (which I consider this to have been) cannot be justified on the ground of the financial loss that might be caused to the employer.[94] Second, whilst the freedom to conduct a business is one of the general principles of EU law[95] and is now enshrined in Article 16 of the Charter, the Court has held that that freedom 'is not an absolute principle but must be viewed in relation to its function in society … Accordingly, limitations may be imposed on the exercise of that freedom provided, in accordance with Article 52(1) of the Charter, that they are prescribed by law and that, in accordance with the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others'.[96] In that regard, the

89 — See judgment of 13 November 2014 in *Vital Pérez*, C-416/13, EU:C:2014:2371, paragraph 41.

90 — Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

91 — Article 2(2) of Directive 76/207 states: 'This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor'.

92 — Judgment of 26 October 1999, C-273/97, EU:C:1999:523. Ms Sirdar wished to be allowed to accept an offer (sent to her in error) to work as a chef in the Royal Marines, the elite commandos of the British Army. The rationale behind the policy of excluding women from service in that unit appears from paragraphs 6 to 9 of the judgment. The careful reasoning of the Court holding that the exclusion did apply appears at paragraphs 28 to 32 of the judgment.

93 — Judgment of 11 January 2000, C-285/98, EU:C:2000:2, paragraph 29. Ms Kreil wished to work in the maintenance (weapon electronics) branch of the Bundeswehr. National law permitted women to enlist only in the medical and military-music services. Citing extensively from the judgment in *Sirdar*, the Court nevertheless held that, 'in view of its scope, such an exclusion, which applies to almost all military posts in the Bundeswehr, cannot be regarded as a derogating measure justified by the specific nature of the posts in question or by the particular context in which the activities in question are carried out' (paragraph 27); and that 'the Directive precludes the application of national provisions, such as those of German law, which impose a general exclusion of women from military posts involving the use of arms and which allow them access only to the medical and military-music services' (paragraph 32).

94 — See judgment of 3 February 2000 in *Mahlburg*, C-207/98, EU:C:2000:64, paragraph 29.

95 — Judgment of 9 September 2004 in *Spain and Finland* v *Parliament and Council*, C-184/02 and C-223/02, EU:C:2004:497, paragraph 51.

96 — Judgment of 14 October 2014 in *Giordano* v *Commission*, C-611/12 P, EU:C:2014:2282, paragraph 49.

Court has found, in relation to safeguarding the fundamental freedom to receive information and the freedom and pluralism of the media guaranteed by Article 11 of the Charter, that the EU legislature was entitled to adopt rules limiting the freedom to conduct a business, and to give priority, in the necessary balancing of the rights and interests at issue, to public access to information over the contractual freedom implicit in the freedom to conduct a business.[97]

101. The same reasoning must apply here as regards the right not to be discriminated against. If nothing else, to interpret Article 4(1) in the manner proposed by Micropole would risk 'normalising' the derogation which that provision lays down. That cannot be right. As I have already indicated,[98] it is intended that the derogation should apply only in the most limited of circumstances.

102. Thus, I can see no basis on which Article 4(1) of Directive 2000/78 could be said to apply to the activities undertaken by Ms Bougnaoui as an employee of Micropole. There is nothing in the order for reference or elsewhere in the information made available to the Court to suggest that, because she wore the Islamic headscarf, she was in any way unable to perform her duties as a design engineer – indeed, the dismissal letter expressly refers to her professional competence. Whatever the precise terms of the prohibition applying to her, the requirement not to wear a headscarf when in contact with customers of her employer could not in my view be a 'genuine and determining occupational requirement'.

*The remaining derogations in respect of direct discrimination*

103. Before concluding my analysis of direct discrimination, I shall consider the remaining derogations that may apply to that type of discrimination under Directive 2000/78.

104. The first is Article 2(5). That provision is unusual inasmuch as its equivalent is not to be found in other EU anti-discrimination legislation.[99] The Court has held that it is intended to prevent and arbitrate a conflict between, on the one hand, the principle of equal treatment and, on the other hand, the necessity of ensuring public order, security and health, the prevention of criminal offences and the protection of individual rights and freedoms, which are necessary for the functioning of a democratic society. It has also held that, as an exception to the principle of the prohibition of discrimination, it must be interpreted strictly.[100]

105. The Article 2(5) derogation cannot apply to the case in the main proceedings. First, there is no suggestion that any relevant national legislation has been enacted in order to give effect to that derogation. Second, even if there were, I cannot see how it might be called in aid to justify discrimination of the kind at issue. I reject the idea that a prohibition on employees wearing religious attire when in contact with customers of their employer's business may be necessary for 'the protection of individual rights and freedoms which are *necessary for the functioning of a democratic society*'.[101] To the extent that such an argument is relevant for the purposes of Directive 2000/78, it falls to be considered in the context of the latitude which the rules governing indirect discrimination may permit[102] and not that of the derogation laid down under Article 2(5).

97 — Judgment of 22 January 2013 in *Sky Österreich*, C-283/11, EU:C:2013:28, paragraph 66.

98 — See point 95 above.

99 — It appears that Article 2(5) was inserted into the directive during the final hours of negotiation (it seems at the insistence of the United Kingdom Government). See Ellis, E., and Watson, P., *EU Anti-Discrimination Law*, Oxford University Press, 2012, p. 403. See also the Fourth Report of the House of Lords Select Committee on the European Union, Session 2000-01, '*The EU Framework Directive on Discrimination*', paragraph 37, which states: '… [Article 2(5)] was added to the Directive only on 17 October, apparently at the insistence of the UK. The Minister wrote on 25 October that it was designed "to make clear that the Directive will not prevent member states acting to protect those at risk from e.g. harmful religious cults or paedophiles".'

100 — See judgment of 13 September 2011 in *Prigge and Others*, C-447/09, EU:C:2011:573, paragraphs 55 and 56.

101 — Emphasis added. As I have indicated earlier (in footnote 75), Article 2(5) might, for example, cover a rule prohibiting proselytising at the workplace.

102 — See point 109 et seq. below.

106. The second is the exception laid down by Article 4(2) of Directive 2000/78. That provision applies to 'occupational activities within churches and other public or private organisations, the ethos of which is based on religion or belief'. Recital 24 of the directive shows that it was intended to give effect to Declaration No 11 on the status of churches and non-confessional organisations.[103] Given the nature of Micropole's activities, the derogation cannot apply in this case.

107. The remaining two provisions derogating from the principle of equal treatment are those set out in Articles 6 and 7 of the directive. The first refers to certain justifications of differences of treatment on grounds of age and the second to measures maintained or adopted by Member States to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1. They plainly are not relevant to the present case.

108. In the light of all the foregoing, it is my view that a rule laid down in the workplace regulations of an undertaking which prohibits employees of the undertaking from wearing religious signs or apparel when in contact with customers of the business involves direct discrimination on grounds of religion or belief, to which neither Article 4(1) of Directive 2000/78 nor any of the other derogations from the prohibition of direct discrimination on grounds of religion or belief which that directive lays down applies. That is *a fortiori* the case if the rule in question applies to the wearing of the Islamic headscarf alone.

*Indirect discrimination*

109. The conclusions I have just set out could, on one view, be said to be sufficient to answer the referring court's question. However, it is possible that the Court may disagree with the analysis I have adopted. I have also indicated the difficulties the Court is faced with in terms of determining the precise scope of the dispute in the main proceedings.[104] It may be that a party to those proceedings will present supplementary facts to the national court that will suggest that the discrimination in question is indirect or that the parties are in a different legal situation. For that reason, I shall address the question of indirect discrimination and consider the application of Article 2(2)(b)(i) of Directive 2000/78 to the case in the main proceedings. I shall, however, do so only briefly.

110. In the analysis of indirect discrimination that follows, I shall assume that there exists a (hypothetical) company rule imposing an entirely neutral dress code on all employees. Thus, any item of apparel that reflects the wearer's individuality in any way is prohibited. Under such a dress code, all religious symbols and apparel are (evidently) banned – but so too is the wearing of a FC Barcelona supporter's shirt or a tie denoting that one attended a particular Cambridge or Oxford college. Those who infringe the rule are reminded of the company code and are warned that compliance with the neutral dress code is mandatory for all employees. If they persist in conduct that infringes that code, they are dismissed. The rule as here formulated is apparently neutral. It does not ostensibly discriminate against those whose religious convictions require them to wear particular apparel. It nevertheless indirectly discriminates against them. If they are to remain true to their religious convictions, they have no option but to infringe the rule and to suffer the consequences.

111. Article 2(2)(b)(i) states that a requirement that would otherwise be discriminatory and therefore unlawful may nevertheless be permitted when the relevant provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

103 — Declaration No 11 is annexed to the Treaty of Amsterdam. It provides that 'the European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. The European Union equally respects the status of philosophical and non-confessional organisations'.

104 — See point 82 above.

Legitimate aim

112. Directive 2000/78 does not define the concept of a legitimate aim for the purposes of Article 2(2)(b)(i). Yet it is clear that the legitimacy of an aim may find its basis in social policy, particularly if that policy has a specific echo in Treaty provisions. Thus, Article 6(1) of the directive specifies, as aims that are legitimate, 'legitimate employment policy, labour market and vocational training objectives', each of which may find their source in Article 3(3) TEU. [105]

113. In a wider context, it seems to me that it is also a legitimate aim to protect the rights and freedoms of others – thus, for example, to afford protection to those who may be mentally impressionable, such as children of a tender age and those among the elderly who may not have retained all their mental faculties and who can thus be assimilated to those in the first category. [106]

114. Next, it seems to me that where the requirement of a legitimate objective laid down by Article 4(1) of Directive 2000/78 is satisfied, for example in the case of a prohibition based on issues related to health and safety, the 'legitimate aim' test set out in Article 2(2)(b)(i) will also be met. [107] The tests in that regard will be the same.

115. I also consider that the interest of the employer's business constitutes a legitimate aim and that it is not the legislation's objective to impede that freedom any more than is appropriate and necessary. [108]

116. That aspect may, it seems to me, be particularly relevant in the following areas:

— the employer may wish to project a particular image to his clients or customers; thus, it seems to me that a policy of requiring that employees wear a uniform or a particular style of dress or maintain a 'smart' outward appearance will fall within the concept of a legitimate aim; [109]

— the same may also apply to rules governing working hours; a duty to be available to work flexible hours, including unsocial hours, where the requirements of the job so dictate is in my view legitimate; [110]

— measures taken by an employer with a view to maintaining harmony within his workforce for the good of his business as a whole.

117. I have already mentioned, however, that the Court has held that the freedom to carry on business is not an absolute principle but may be subject to limitations provided, inter alia, that they are prescribed by law. [111] In the present case, it is clear that the limitations imposed by the right to equal treatment in terms of freedom from discrimination on the grounds of, inter alia, religion or belief, are prescribed by law. They are expressly provided for in Directive 2000/78.

105 — See, to that effect, judgment of 16 October 2007 in *Palacios de la Villa*, C-411/05, EU:C:2007:604, paragraph 64.

106 — See, as regards the case-law of the Strasbourg Court, decision of 15 February 2001 in *Dahlab v. Switzerland*, CE:ECHR:2001:0215DEC004239398, referred to in point 48 above. In that decision, the Strasbourg Court described the children taught by the applicant as being 'very young'. It seems to me that children of primary school age may justifiably be described as 'impressionable'. Once they have progressed to secondary school, they may be considered more mature and thus more able to form their own views and/or to take cultural diversity in their stride.

107 — I draw nothing from the fact that Article 2(2)(b)(i) refers to a 'legitimate aim' while Article 4(1) refers to a 'legitimate objective'.

108 — See further point 100 above.

109 — See, in that regard, judgment of the Strasbourg Court of 15 January 2013 in *Eweida and Others v. The United Kingdom*, CE:ECHR:2013:0115JUD004842010, § 94. Here, the obvious way of reconciling the employer's legitimate business interests and the employee's freedom to manifest his religion is to make provision for the necessary religious apparel *within* the uniform. See point 123 below.

110 — A (permissible) requirement to work 'unsocial' or 'flexible' hours should not, however, be confused with insisting that the employee must, at any price, work on a day that is of particular significance in that employee's religion (for example, requiring a committed Christian to work on Christmas Day, Good Friday or Easter Day; or an observant Jew to work on Rosh Hashanah, Yom Kippur or Pesach). The latter form of requirement would in my view be impermissible.

111 — See point 100 above.

118. Here, I emphasise that, to someone who is an observant member of a faith, religious identity is an integral part of that person's very being. The requirements of one's faith – its discipline and the rules that it lays down for conducting one's life – are not elements that are to be applied when outside work (say, in the evenings and during weekends for those who are in an office job) but that can politely be discarded during working hours. Of course, depending on the particular rules of the religion in question and the particular individual's level of observance, this or that element may be non-compulsory for that individual and therefore negotiable. But it would be entirely wrong to suppose that, whereas one's sex and skin colour accompany one everywhere, somehow one's religion does not. [112]

119. These proceedings present a classic example of precisely that situation. Two protected rights – the right to hold and manifest one's religion and the freedom to carry on a business – are potentially in conflict with one another. An accommodation must be found so that the two can coexist in a harmonious and balanced way. It is with that in mind that I turn to the question of proportionality.

Proportionality

120. Article 2(2)(b)(i) of Directive 2000/78 provides that the means of achieving the aims underlying the measure in question must also be appropriate and necessary. Those means must, in other words, be proportionate.

121. In her analysis of proportionality for the purposes of Directive 2000/78 in her Opinion in *Ingeniørforeningen i Danmark* , [113] Advocate General Kokott observed that the principle of proportionality required that 'measures must not cause disadvantages which are disproportionate to the aims pursued even if those measures are appropriate and necessary for meeting legitimate objectives'. It is 'necessary to find the 'right balance' between the different interests involved'. I agree entirely.

122. In that context, it seems to me that the starting point for any analysis must be that an employee has, in principle, the right to wear religious apparel or a religious sign but that the employer also has, or may have, the right to impose restrictions. [114]

123. Thus, it seems to me that where an undertaking has a policy requiring its employees to wear a uniform, it is not unreasonable to require that employees should do as much as possible to meet it. An employer can therefore stipulate that those employees who wear an Islamic headscarf should adopt the colour of that uniform when selecting their headscarf (or, indeed, propose a uniform version of that headscarf). [115]

124. Similarly, where it is possible for an employee to wear a religious symbol discreetly, as was the case for example with Ms Eweida in the Strasbourg Court judgment, [116] it may be proportionate to require him or her to do so.

112 — See, by way of analogy, judgment of 5 September 2012 in *Y and Z*, C-71/11 and C-99/11, EU:C:2012:518, paragraphs 62 and 63.

113 — C-499/08, EU:C:2010:248, point 68.

114 — As, indeed, the Strasbourg Court effectively held in its judgment of 15 January 2013 in *Eweida and Others v. The United Kingdom*, CE:ECHR:2013:0115JUD004842010.

115 — See, in that context, http://www.bbc.com/news/uk-scotland-36468441, referring to a recent proposal by Police Scotland (the Scottish national police force) to introduce a hijab as an optional part of its uniform in order to encourage Muslim women to join the force.

116 — See judgment of 15 January 2013 in *Eweida and Others v. The United Kingdom*, CE:ECHR:2013:0115JUD004842010, § 94.

125. What is proportionate may vary depending on the size of the undertaking concerned. The bigger the business, the more likely it will be to have resources allowing it to be flexible in terms of allocating its employees to the tasks required of them. Thus, an employer in a large undertaking can be expected to take greater steps to make a reasonable accommodation with his workforce than an employer in a small- or medium-sized one.

126. Where a particular form of religious observance is not regarded as essential by the adherent to that religion, the chances of a conflict of positions such as that which has led to the present proceedings are reduced. The employer will ask the employee to refrain from a particular practice. Because that practice was (relatively) unimportant to the employee, he or she may decide to comply. The potential conflict disappears.

127. But what should happen when the practice in question is viewed as essential by the individual employee?

128. I have already indicated that there may be instances where the particular type of observance that the employee regards as essential to the practice of his/her religion means that he cannot do a particular job.[117] More often, I suggest, the employer and employee will need to explore the options together in order to arrive at a solution that accommodates both the employee's right to manifest his religious belief and the employer's right to conduct his business.[118] Whilst the employee does not, in my view, have an absolute right to insist that he be allowed to do a particular job within the organisation on his own terms, nor should he readily be told that he should look for alternative employment.[119] A solution that lies somewhere between those two positions is likely to be proportionate. Depending on precisely what is at issue, it may or may not involve some restriction on the employee's unfettered ability to manifest his religion; but it will not undermine an aspect of religious observance that that employee regards as essential.[120]

129. There is one particular additional observation that I wish to make in respect of the issue in the present case.

130. Western society regards visual or eye contact as being of fundamental importance in any relationship involving face-to-face communication between representatives of a business and its customers.[121] It follows in my view that a rule that imposed a prohibition on wearing religious apparel that covers the eyes and face entirely whilst performing a job that involved such contact with customers would be proportionate. The balancing of interests would favour the employer. Conversely, where the employee in question is asked to work in a role which involves no visual or eye contact with customers, for example in a call centre, the justification for the *same rule* would disappear. The balance will favour the employee. And where the employee seeks to wear only some form of headgear that leaves the face and eyes entirely clear, I can see no justification for prohibiting the wearing of that headgear.

117 — See, in that regard, point 99 above.

118 — Thus, for example, it was clear in the *Eweida* case that British Airways had indeed reached such accommodation with its Muslim employees.

119 — See, as regards the evolution of the views of the Strasbourg Court in this context, point 55 above.

120 — Suppose, for example, that the employee regards himself as being under an obligation to pray three times a day. Against the background of a normal office day, that is relatively easy to accommodate: prayer before and after work and prayer during the lunch break. Only the latter is during the actual working day; and it is during the official free time (the lunch break). Now suppose the obligation is prayer five times a day. The employee argues that he needs to be allowed two more prayer times during the working day. The first question is whether that is really the case – can one or both of the additional times for prayer not also be scheduled for before or after he comes to work? But perhaps the prayer times are linked to specific times of the day. If so, perhaps there are coffee or smoking breaks during the working day that the employee can use for prayer; but probably he will have to agree to work later or arrive earlier in order to compensate the employer for his temporary absence from work in order to fulfil his religious obligation. If necessary, the employee will have to accept the additional constraint (a longer working day); the employer will have to allow him to do that rather than insisting that no accommodation is possible and dismissing the employee.

121 — For a more detailed analysis of the importance of non-verbal communication in a business context, see Woollcott, L.A., *Mastering Business Communication*, Macmillan, 1983.

131. Both in its written and oral submissions, Micropole has placed great emphasis on the fact that the proportion of Ms Bouganoui's working time during which she was in contact with customers and thus prohibited from wearing an Islamic headscarf was not greater than 5%. On that basis, it argues that the restriction was proportionate. Such an argument seems to me to miss the point. The amount of time in respect of which a prohibition may apply may have no bearing on the employee's reason for seeking to wear the head covering in question. Ms Bougnaoui's religious conviction as to what constitutes appropriate attire for herself as an observant Muslim woman is that she should wear an Islamic headscarf (the hijab) whilst at work. If that is the position when she is within the familiar daily environment of her employer's business, it is reasonable to suppose that it is a fortiori the position when she is away from that environment and in contact with parties external to her employer's business.

132. Whilst the question is ultimately one for the national court having the responsibility for reaching a final decision in the matter and while there may be other matters relevant to any discussion on proportionality of which this Court has not been informed, I consider it unlikely that an argument based on the proportionality of the prohibition imposed under Micropole's workplace regulations – whether the ban involved the wearing of religious signs or apparel generally or the Islamic headscarf alone – would succeed in the case in the main proceedings.

133. My final observation is this. It seems to me that in the vast majority of cases it will be possible, on the basis of a sensible discussion between the employer and the employee, to reach an accommodation that reconciles adequately the competing rights of the employee to manifest his or her religion and the employer to conduct his business. Occasionally, however, that may not be possible. In the last resort, the business interest in generating maximum profit should then in my view give way to the right of the individual employee to manifest his religious convictions. Here, I draw attention to the insidiousness of the argument, 'but we need to do X because otherwise our customers won't like it'. Where the customer's attitude may itself be indicative of prejudice based on one of the 'prohibited factors', such as religion, it seems to me particularly dangerous to excuse the employer from compliance with an equal treatment requirement in order to pander to that prejudice. Directive 2000/78 is intended to confer protection in employment against adverse treatment (that is, discrimination) on the basis of one of the prohibited factors. It is not about losing one's job in order to help the employer's profit line.

134. In the light of all the foregoing, I conclude that where there is indirect discrimination on grounds of religion or belief, Article 2(2)(b)(i) of Directive 2000/78 should be construed so as to recognise that the interests of the employer's business will constitute a legitimate aim for the purposes of that provision. Such discrimination is nevertheless justified only if it is proportionate to that aim.

## Conclusion

135. I therefore propose that, in answer to the question referred, the Court should reply to the Cour de Cassation (Court of Cassation, France) as follows:

(1) A rule laid down in the workplace regulations of an undertaking which prohibits employees of the undertaking from wearing religious signs or apparel when in contact with customers of the business involves direct discrimination on grounds of religion or belief, to which neither Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation nor any of the other derogations from the prohibition of direct discrimination on grounds of religion or belief which that directive lays down applies. That is *a fortiori* the case when the rule in question applies to the wearing of the Islamic headscarf alone.

(2) Where there is indirect discrimination on grounds of religion or belief, Article 2(2)(b)(i) of Directive 2000/78 should be construed so as to recognise that the interests of the employer's business will constitute a legitimate aim for the purposes of that provision. Such discrimination is nevertheless justified only if it is proportionate to that aim.

Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

14 March 2017*

(Reference for a preliminary ruling — Social policy — Directive 2000/78/EC — Equal treatment — Discrimination based on religion or belief — Genuine and determining occupational requirement — Meaning — Customer's wish not to have services provided by a worker wearing an Islamic headscarf)

In Case C-188/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Court of Cassation, France), made by decision of 9 April 2015, received at the Court on 24 April 2015, in the proceedings

**Asma Bougnaoui,**

**Association de défense des droits de l'homme (ADDH)**

v

**Micropole SA**, formerly Micropole Univers SA,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen, M. Berger, M. Vilaras and E. Regan, Presidents of Chambers, A. Rosas, A. Borg Barthet, J. Malenovský, E. Levits, F. Biltgen (Rapporteur), K. Jürimäe and C. Lycourgos, Judges,

Advocate General: E. Sharpston,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 15 March 2016,

after considering the observations submitted on behalf of:

— Ms Bougnaoui and the Association de défense des droits de l'homme (ADDH), by C. Waquet, avocate,

— Micropole SA, by D. Célice, avocat,

— the French Government, by G. de Bergues, D. Colas and R. Coesme, acting as Agents,

— the Swedish Government, by A. Falk, C. Meyer-Seitz, U. Persson, N. Otte Widgren, E. Karlsson and L. Swedenborg, acting as Agents,

* Language of the case: French.

— the United Kingdom Government, by S. Simmons, acting as Agent, and by A. Bates, Barrister,

— the European Commission, by D. Martin and M. Van Hoof, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 July 2016,

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

2 The request has been made in proceedings between Ms Asma Bougnaoui and the Association de défense des droits de l'homme (Association for the protection of human rights) (ADDH), and Micropole SA, formerly Micropole Univers SA ('Micropole') concerning the latter's dismissal of Ms Bougnaoui because of her refusal to remove her Islamic headscarf when sent on assignment to customers of Micropole.

### Legal context

*Directive 2000/78*

3 Recitals 1, 4 and 23 of Directive 2000/78 state:

'(1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

…

(4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.

…

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.'

4 Article 1 of Directive 2000/78 provides:

'The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'

5 Article 2(1) and (2) of the directive provides:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, …

…'

6 Article 3(1) of the directive states:

'Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

…

(c) employment and working conditions, including dismissals and pay;

…'

7 Article 4(1) of Directive 2000/78 provides:

'Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.'

*French law*

8 The provisions of Directive 2000/78 were transposed into French law, notably Articles L. 1132-1 and L. 1133-1 of the code du travail (Labour Code), by Law No 2008-496 of 27 May 2008 laying down various provisions to bring anti-discrimination legislation into line with Community law (*Journal officiel de la République française* (JORF), 28 May 2008, p. 8801).

9 Article L. 1121-1 of the Labour Code states:

'No one may limit personal rights or individual or collective liberties by any restriction which is not justified by the nature of the task to be performed and proportionate to the aim sought.'

10 Article L. 1132-1 of the Labour Code, in the version in force at the material time, provided as follows:

'No person may be excluded from a recruitment procedure or from access to work experience or a period of training at an undertaking, no employee may be disciplined, dismissed or be subject to discriminatory treatment, whether direct or indirect, as defined in Article 1 of Law No 2008-496 of 27 May 2008 laying down various provisions to bring anti-discrimination legislation into line with Community law, in particular as regards remuneration, within the meaning of Article L. 3221-3, incentive or employee share schemes, training, reclassification, allocation, certification, classification, career promotion, transfer, or contract renewal by reason of his origin, his sex, his conduct, his sexual orientation, his age, … his political opinions, his trade union or works council activities, his religious beliefs, his physical appearance, his surname or by reason of his state of health or disability.'

11 Article L. 1133-1 of the Labour Code is worded as follows:

'Article L. 1132-1 shall not preclude differences of treatment arising from a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.'

12 Article L. 1321-3 of the Labour Code, in the version in force at the material time, provided as follows:

'Workplace regulations shall not contain:

1° Provisions contrary to primary or secondary law or to the requirements laid down by the collective agreements and understandings as to working practices applicable in the undertaking or establishment;

2° Provisions imposing restrictions on personal rights and on individual and collective freedoms which are not justified by the nature of the task to be undertaken or proportionate to the aim that is sought to be achieved;

3° Provisions discriminating against employees in their employment or at their work, having the same professional ability, by reason of their origin, their sex, their conduct, their sexual orientation, their age … their political opinions, their trade union or works council activities, their religious beliefs, their physical appearance, their surname or by reason of their state of health or disability.'

## The dispute in the main proceedings and the question referred for a preliminary ruling

13 It is apparent from the material in the file available to the Court that Ms Bougnaoui met a representative of Micropole, a private undertaking, at a student fair in October 2007, prior to being recruited by Micropole, and that the representative informed her that the wearing of an Islamic headscarf might pose a problem when she was in contact with customers of the company. When Ms Bougnaoui arrived at Micropole on 4 February 2008 for an internship, she was wearing a simple bandana. She subsequently wore an Islamic headscarf in the workplace. At the end of her internship, Micropole employed her, from 15 July 2008, as a design engineer under a contract of employment of indefinite duration.

14 Having been called, on 15 June 2009, to an interview preliminary to possible dismissal, Ms Bougnaoui was dismissed by a letter of 22 June 2009 that stated as follows:

'... As part of your duties, you are called upon to take part in assignments for our customers.

We asked you to work for the customer … on 15 May, at their site in .... Following that work, the customer told us that the wearing of a veil, which you in fact wear every day, had upset a number of its employees. It also requested that there should be "no veil next time".

When you were taken on by our company, in your interviews with your Operational Manager … and the Recruitment Manager …, the subject of wearing a veil had been addressed very clearly with you. We said to you that we entirely respect the principle of freedom of opinion and the religious beliefs of everyone, but that, since you would be in contact internally or externally with the company's customers, you would not be able to wear the veil in all circumstances. In the interests of the business and for its development we are obliged, vis-à-vis our customers, to require that discretion is observed as regards the expression of the personal preferences of our employees.

At our interview on 17 June, we reaffirmed that principle of the need for neutrality to you and we asked you to apply it as regards our customers. We asked you again whether you could accept those professional requirements by agreeing not to wear the veil, and you answered in the negative.

We consider that those facts justify, for the aforementioned reasons, the termination of your contract of employment. Inasmuch as your position makes it impossible for you to carry out your functions on behalf of the company, since we cannot contemplate, given your stance, your continuing to provide services at our customers' premises, you will not be able to work out your notice period. Since that failure to work during the notice period is attributable to you, you will not be remunerated for your notice period.

We regret this situation as your professional competence and your potential had led us to hope for a long-term working relationship.'

15 Ms Bougnaoui considered that dismissal to be discriminatory and brought an action before the conseil de prud'hommes de Paris (Labour Tribunal, Paris, France) on 8 September 2009. On 4 May 2011, the conseil de prud'hommes de Paris (Labour Tribunal, Paris) ordered Micropole to pay compensation in respect of her period of notice because it had failed to indicate in its letter of dismissal the gravity of Ms Bougnaoui's alleged misconduct, and dismissed the remainder of the action on the ground that the restriction of Ms Bougnaoui's freedom to wear the Islamic headscarf was justified by her contact with customers of that company and proportionate to Micropole's aim of protecting its image and of avoiding conflict with its customers' beliefs.

16 Ms Bougnaoui, supported by the ADDH, appealed against that decision to the cour d'appel de Paris (Court of Appeal, Paris, France), which, by decision of 18 April 2013, upheld the decision of the conseil de prud'hommes de Paris (Labour Tribunal, Paris). In its decision, it ruled, in particular, that Ms Bougnaoui's dismissal did not arise from discrimination connected with the religious beliefs of the employee, since she was permitted to continue to express them within the undertaking, and that it was justified by a legitimate restriction arising from the interests of the undertaking where the exercise by the employee of the freedom to manifest her religious beliefs went beyond the confines of the undertaking and was imposed on the latter's customers without any consideration for their feelings, impinging on the rights of others.

17 Ms Bougnaoui and the ADDH brought an appeal against the decision of 18 April 2013 before the Cour de cassation (Court of Cassation). They claimed that the cour d'appel de Paris (Court of Appeal, Paris) had, inter alia, infringed Articles L. 1121-1, L. 1321-3 and L. 1132-1 of the Labour Code. Restrictions on religious freedom should be justified by the nature of the task to be undertaken and should arise

from a genuine and determining occupational requirement, subject to the proviso that the objective be legitimate and the requirement proportionate. They argued that the wearing of the Islamic headscarf by an employee of a private undertaking when in contact with customers does not prejudice the rights or beliefs of others, and that the embarrassment or sensitivity of the customers of a commercial company, at the mere sight, allegedly, of a sign of religious affiliation, is neither a relevant nor legitimate criterion, free from any discrimination, that might justify the company's economic or commercial interests being allowed to prevail over the fundamental freedom of religion of an employee.

18 The Social Chamber of the Cour de cassation (Court of Cassation), before which the appeal lodged by the appellants in the main proceedings was brought, notes that, in its judgment of 10 July 2008, *Feryn* (C-54/07, EU:C:2008:397), the Court of Justice merely ruled that the fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment within the meaning of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22), but did not determine whether Article 4(1) of Directive 2000/78 must be interpreted as meaning that the wish of an employer's customer no longer to have that employer's services provided by a worker on one of the grounds to which that directive refers is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out.

19 In those circumstances, the Cour de cassation (Court of Cassation) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 4(1) of Directive 2000/78 be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?'

**Request to reopen the oral procedure**

20 After delivery of the Advocate General's opinion, Micropole lodged, on 18 November 2016, a request that the oral procedure be reopened pursuant to Article 83 of the Rules of Procedure of the Court of Justice.

21 Micropole argued in support of its request that the Court needed to be made aware of Micropole's observations following the delivery of that opinion and that it wished to provide the Court with additional information.

22 It should be noted in that regard that the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in accordance with Article 83 of its Rules of Procedure, in particular if it considers that it lacks sufficient information or where the case must be decided on the basis of an argument which has not been debated by the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

23 In the present case, the Court considers, having heard the Advocate General, that it has all the information necessary to enable it to rule on the action before it, and that the action does not have to be decided on the basis of an argument which has not been debated before the Court.

24 Micropole's request for the oral part of the procedure to be reopened must therefore be refused.

**Consideration of the question referred**

25 By its question, the referring court asks, in essence, whether Article 4(1) of Directive 2000/78 must be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have that employer's services provided by a worker wearing an Islamic headscarf constitutes a genuine and determining occupational requirement within the meaning of that provision.

26 In the first place, it should be observed that, in accordance with Article 1 of Directive 2000/78, the purpose of that directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

27 As regards the meaning of 'religion' in Article 1 of that directive, it should be noted that the directive does not include a definition of that term.

28 Nevertheless, the EU legislature referred, in recital 1 of Directive 2000/78, to fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), which provides, in Article 9, that everyone has the right to freedom of thought, conscience and religion, a right which includes, in particular, freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

29 In the same recital, the EU legislature also referred to the constitutional traditions common to the Member States, as general principles of EU law. Among the rights resulting from those common traditions, which have been reaffirmed in the Charter of Fundamental Rights of the European Union ('the Charter'), is the right to freedom of conscience and religion enshrined in Article 10(1) of the Charter. In accordance with that provision, that right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. As is apparent from the explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), the right guaranteed in Article 10(1) of the Charter corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52(3) of the Charter, has the same meaning and scope.

30 In so far as the ECHR and, subsequently, the Charter use the term 'religion' in a broad sense, in that they include in it the freedom of persons to manifest their religion, the EU legislature must be considered to have intended to take the same approach when adopting Directive 2000/78, and therefore the concept of 'religion' in Article 1 of that directive should be interpreted as covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public.

31 In the second place, it should be noted that it is not clear from the order for reference whether the referring court's question is based on a finding of a difference of treatment based directly on religion or belief, or on a finding of a difference of treatment based indirectly on those criteria.

32 If, which it is for the referring court to ascertain, Ms Bougnaoui's dismissal was based on non-compliance with a rule in force within that undertaking, prohibiting the wearing of any visible sign of political, philosophical or religious beliefs, and if it were to transpire that that apparently neutral rule resulted, in fact, in persons adhering to a particular religion or belief, such as Ms Bougnaoui, being put at a particular disadvantage, it would have to be concluded that there was a difference of treatment indirectly based on religion or belief, as referred to in Article 2(2)(b) of Directive 2000/78 (see, to that effect, judgment of today's date, *G4S Secure Solutions*, C-157/15, paragraphs 30 and 34).

33 However, under Article 2(2)(b)(i) of the directive, such a difference of treatment does not amount to indirect discrimination if it is objectively justified by a legitimate aim, such as the implementation, by Micropole, of a policy of neutrality vis-à-vis its customers, and if the means of achieving that aim are appropriate and necessary (see, to that effect, judgment of today's date, *G4S Secure Solutions*, C-157/15, paragraphs 35 to 43).

34 By contrast, if the dismissal of Ms Bougnaoui was not based on the existence of an internal rule such as that referred to in paragraph 32 of the present judgment, it is necessary to consider, as this Court is invited to do by the question from the referring court, whether the willingness of an employer to take account of a customer's wish no longer to have services provided by a worker who, like Ms Bougnaoui, has been assigned to that customer by the employer and who wears an Islamic headscarf constitutes a genuine and determining occupational requirement within the meaning of Article 4(1) of Directive 2000/78.

35 According to that provision, Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 of the directive is not to constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

36 Thus, it is for the Member States to stipulate, should they choose to do so, that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 of the directive does not constitute discrimination. That appears to be the case here, under Article L. 1133-1 of the Labour Code, which it is, however, for the referring court to ascertain.

37 That said, it should be borne in mind that the Court has repeatedly held that it is clear from Article 4(1) of Directive 2000/78 that it is not the ground on which the difference of treatment is based but a characteristic related to that ground which must constitute a genuine and determining occupational requirement (see judgments of 12 January 2010, *Wolf*, C-229/08, EU:C:2010:3, paragraph 35; of 13 September 2011, *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 66; of 13 November 2014, *Vital Pérez*, C-416/13, EU:C:2014:2371, paragraph 36; and of 15 November 2016, *Salaberria Sorondo*, C-258/15, EU:C:2016:873, paragraph 33).

38 It should, moreover, be pointed out that, in accordance with recital 23 of Directive 2000/78, it is only in very limited circumstances that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement.

39 It must also be pointed out that, according to the actual wording of Article 4(1) of Directive 2000/78, such a characteristic may constitute such a requirement only 'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out'.

40 It follows from the information set out above that the concept of a 'genuine and determining occupational requirement', within the meaning of that provision, refers to a requirement that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out. It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer.

41 Consequently, the answer to the question put by the referring court is that Article 4(1) of Directive 2000/78 must be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision.

## Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

**Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision.**

[Signatures]